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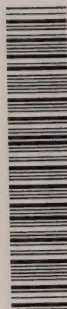
# Report of the Elliot Lake Commission of Inquiry

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## Part One:

The Events Leading to the  
Collapse of the Algo Centre Mall

**The Honourable Paul R. Bélanger**  
*Commissioner*



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# Report of the Elliot Lake Commission of Inquiry

## **Part One:**

The Events Leading to the  
Collapse of the Algo Centre Mall

**The Honourable Paul R. Bélanger**  
*Commissioner*



The Report consists of three volumes:

1. The Events Leading to the Collapse of the Algo Centre Mall;
2. The Emergency Response and Inquiry Process; and
3. Executive Summary.

Ontario Ministry of the Attorney General

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**THE ELLIOT LAKE  
COMMISSION OF INQUIRY**

The Honourable Paul R. Bélanger,  
Commissioner



**LA COMMISSION  
D'ENQUETE ELLIOT LAKE**

L'honorable Paul R. Bélanger,  
Commissaire

October 15, 2014

The Honourable Madeleine Meilleur  
Attorney General of Ontario  
Ministry of the Attorney General  
720 Bay Street, 11th Floor  
Toronto, ON  
M5G 2K1

Dear Madam Attorney,

I am pleased to deliver to you the Report of the Elliot Lake Commission of Inquiry in both its English and French versions, as required by the Order in Council creating the Inquiry.

Part One examines the events leading up to the collapse of the Algo Centre Mall in Elliot Lake on June 23, 2012 and Part Two looks at the emergency response to the collapse. Both volumes contain my recommendations for changes to rules, regulations, practices and procedures related to the maintenance and inspection of publicly accessible buildings and the emergency response to disasters. The third volume is an executive summary.

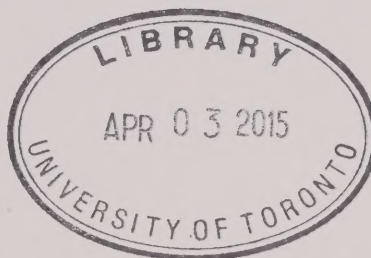
I hope that the Report will lead to a safer Ontario.

It has been an honour and a privilege to serve as Commissioner.

Yours very truly,

A handwritten signature in blue ink, appearing to read "P. Bélanger".

Paul R. Bélanger  
Commissioner







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*Through sloth the roof sinks in,  
and through indolence the house leaks.*

– Ecclesiastes 10:18







This volume is dedicated to the memory of the two women who died in the collapse of the Algo Mall on June 23, 2012.



### **Doloris Perizzolo**

Our mother was a healthy 74-year-old lady at the time of her death. She was a very loving, giving, nurturing mother. She enjoyed her married life to Giuseppe for 46 years, and they built their life in Elliot Lake. After the passing of our father on May 22, 2011, she became lonely and withdrawn from life. A year after our father's death, she became more involved with life. She visited her daughter Cindy and son-in-law George in Guelph for a month. She began to dress in her good clothes again and went to the hairdresser weekly. Her confidence level was clearly returning. She was totally independent, had a vehicle, a home, and two pets she took care of – Maggie her dog and Harley her cat. She would go to the Mall daily to socialize. She had realized that she had to go on with life without our father, and to live life to its fullest with the six of us.

She is sadly missed by all of us. May she rest in peace.

~ Teresa Perizzolo and Darrin Latulippe



### **Lucie Aylwin**

Lucie was a confidante, daughter, sister, and aunt. She was driven to listen to and help anyone in any way she could. She knew what she wanted out of life – her upcoming wedding, home renovations and countless other adventures. With sincerity and tenacity, she took on life's challenges, along with ambitions such as furthering her career and traveling abroad. For everyone lucky enough to have known Lucie, her never-ending smile, laughter, and kindness will be missed.

~ Réjean and Rachelle Aylwin





# The Events Leading to the Collapse of the Algo Centre Mall

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SECTION

# I

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## Introduction and Background



*On June 23, 2012, at precisely 2:18 p.m., the heart of Elliot Lake, Ontario, stopped beating. The rooftop parking deck of the Algo Mall collapsed onto the two floors below, sending tons of concrete, mangled steel, drywall, glass, and one vehicle crashing down.*

## Introduction

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## Background information for this Inquiry

On June 23, 2012, at precisely 2:18 p.m., the heart of Elliot Lake, Ontario, stopped beating. The rooftop parking deck of the Algo Mall collapsed onto the two floors below, sending tons of concrete, mangled steel, drywall, glass, and one vehicle crashing down. Large pieces of steel and concrete (“widow makers,” the rescuers called them) hung precariously over the huge pile of debris. Collapsed escalators were barely held up by overstressed beams, threatening to fall even further at any moment.

It was a warm and sunny summer Saturday afternoon, and the Mall was not as crowded as it often was. Still, many employees and shoppers were inside the building, along with a few Elliot Lake residents who had gathered at the Mall to enjoy a coffee as they socialized with their friends. The collapse was abrupt, precipitous, and came without any warning. Immediately, it shattered the city and transfixed the nation. It also took the lives of Doloris Perizzolo and Lucie Aylwin. Nineteen other people were injured.

For the following 48 hours, local firefighters along with search and rescue teams from both Toronto and the Ontario Provincial Police feverishly searched the rubble pile for survivors, encouraged by tantalizing indications that someone, miraculously, might still be alive under the wreckage.

Then, suddenly, the rescue effort was halted – the risk of harm to the rescuers was deemed to be too great. Engineers advised that the entire remaining structure of the Mall was dangerously unstable. Unfortunately, no alternative plan had been developed, and, with no direction, the rescuers gave up. Only after Premier Dalton McGuinty intervened on June 25 did the rescue operation resume, in the faint but rekindled hope that a specialized crane trucked in from Toronto might allow the removal of the material lying over the suspected victims without risking the lives of those involved in the rescue. Tragically, despite unremitting work over two more days, that effort proved to be in vain when the bodies of the two women were recovered on June 27.

The Algo Mall was more than a shopping centre in this Northern Ontario city – it was a gathering point for the thousands of retirees who had settled there and an economic hub offering all residents a number of centralized services. It housed federal and provincial offices, the municipal Library, and the offices of the local MPP and the local Member of Parliament, along with their campaign offices during elections. It had a hotel, a food court, a funeral services firm, numerous retail stores, and a lottery kiosk.

**Paradoxically, almost from the day the Mall was built in 1979, the roof leaked. Some local residents dubbed it the Algo Falls. Buckets and tarps became part of its architecture.**

Paradoxically, almost from the day the Mall was built in 1979, the roof leaked. Some local residents dubbed it the Algo Falls. Buckets and tarps became part of its architecture. The Library, in particular, was so often inundated that the integrity of its staff, its patrons, and its collections became a matter of daily concerns for its governing board.

Six days after the collapse, Premier McGuinty announced that an independent public inquiry would be held into the disaster: “We have an obligation to do whatever we can to prevent similar tragedies,” he said, “and [to] respond in the best way possible when they do happen.”<sup>1</sup> On July 9, 2013, the Attorney General announced my appointment as Commissioner.

Ten days later the government released Order in Council 1097/2012, setting out the Terms of Reference of this Inquiry under the *Public Inquiries Act, 2009*.<sup>2</sup> I was directed to

- a. Inquire into and report on events surrounding the collapse of the Algo Centre Mall in Elliot Lake, Ontario, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals in attendance at the mall and the emergency management and response by responsible bodies and individuals subsequent to the collapse;

- b. Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity and safety of the Algo Centre Mall in Elliot Lake, Ontario;
- c. Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the emergency management and response to the collapse of the Algo Centre Mall.

Further, the Order in Council instructed that

The Commission shall perform its duties without expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission shall further ensure that the conduct of the inquiry does not in any way interfere or conflict with any ongoing investigation or proceeding related to these matters.

and

Where the Commissioner considers it essential and at his discretion, he may engage in any activity appropriate to fulfilling his duties, including:

- a. Conducting research and collecting information, including conducting interviews and undertaking surveys;
- b. Conducting inter-jurisdictional research to identify practices and successes in other jurisdictions that are relevant to the Ontario experience;
- c. Consulting with or seeking submissions from key stakeholders and sector experts;
- d. Consulting with the general public, including consulting prior to making its rules or determining who may participate in the public inquiry; and
- e. Receiving oral and written submissions.

I determined that the Inquiry would be conducted in two parts. The first part would examine all events leading up to the collapse, and the second would look at the emergency response that followed. The first part entailed a detailed study of the 33-year history of the Mall – its construction and ownership, and the roles of a variety of individuals and organizations whose involvement was important to the Mall: engineers, building inspectors, City officials and politicians, and so on. During this part I heard 72 witnesses over 80 days. Close to 11,000 documents were entered as evidence. (The appendices to this volume document this part of the Inquiry.)

The second part of the Inquiry looked at the events of nearly one week following the collapse. Its chronology was marked by minutes and hours, rather than months and years. The hearings for this part lasted 36 days, and I heard 52 witnesses.

After the completion of the evidence and the closing submissions, I convened a series of policy roundtables to assist in formulating my recommendations. Each roundtable, chaired by one of the Commission counsel, consisted of a number of experts who considered a series of questions prepared by Commission staff. These questions were also designed to reflect the recommendations made by the Participants in their closing submissions.

Part One of this Report details the evidence I heard and my analysis and conclusions on the first part of my mandate. I hope that, by means of the recommendations I propose, both the visiting public and the workers in structures similar to the Mall will be made safer and more secure.



Finally, a note on terminology: throughout this Report, I refer to the Algo Mall as either the “Mall” or the “Algo Mall”; the Algo Inn Hotel as either the “Hotel” or the “Algo Hotel”; and the entire complex (the Mall and the Hotel) as the “Algo Centre.” Readers who wish to refer to the day-by-day testimony or other matters before the Commission can link to <http://elliottlakeinquiry.ca/transcripts/index.html> or to our general website at <http://elliottlakeinquiry.ca>.

## General comments

Although it was rust that defeated the structure of the Algo Mall, the real story behind the collapse is one of human, not material, failure. Many of those whose calling or occupation touched the Mall displayed failings – its designers and builders, its owners, some architects and engineers, as well as the municipal and provincial officials charged with the duty of protecting the public. Some of these failings were minor, some were not: They ranged from apathy, neglect, and indifference through mediocrity, ineptitude, and incompetence to outright

**Although it was rust that defeated the structure of the Algo Mall, the real story behind the collapse is one of human, not material, failure. Many of those whose calling or occupation touched the Mall displayed failings – its designers and builders, its owners, some architects and engineers, as well as the municipal and provincial officials charged with the duty of protecting the public.**

greed, obfuscation, and duplicity. Occasional voices of alarm and warning blew by deaf and callous ears. Warning signs went unseen by eyes likely averted for fear of jeopardizing the Mall’s existence – the social and economic centre in Elliot Lake.

Some engineers forgot the moral and ethical foundation of their vocation and profession: holding paramount the safety, health, and welfare of the public. They occasionally pandered more to their clients’ sensitivities than to their professional obligation to expose the logical and scientific consequences of their observations. Some of their inspections were so cursory and incomplete as to be essentially meaningless. Others were fundamentally flawed because they were based on false assumptions or calculations.

Some public officials simply lacked competence. Others preferred strict adherence to, and narrow interpretation of, practices, rules, and by-laws rather than conduct based on a meaningful interpretation of their spirit and intent. The institutional and legal relationship between organizations

meant to advance the public good operated to disenfranchise the City’s electorate and may have led to tolerating unacceptable conditions at the Mall. Secrecy and confidentiality often trumped candour, transparency, and openness. It pervaded contractual and professional relationships, and even the municipal administration sought to cloak some of its activities from public view.

Based on any fair and objective analysis of the history of the Algo Mall as it was developed during the Commission’s hearings, it is difficult to resist the conclusion that, if any one of the owners, engineers, or officials who were involved with the Mall over its 33 years of existence had insisted, “Enough – this building will fail if it isn’t fixed,” two lives would not have been senselessly and tragically lost. A few persons did just that, but they were ignored. Instead, faced with the clearest of warning signs, owners sold or attempted to sell the problem instead of fixing it. They opted for the narrowest of interpretations of engineering reports – always the least expensive solution that merely repeated past feeble and ineffectual remedies. Many witnesses averred that they were unaware of one of the most basic and widely understood tenets of material science: a combination of water, air, and chlorides makes steel rust; and continuously rusting steel gets progressively weaker as time goes by.

This Report explains why I reached the conclusions I did. It reviews and analyzes the evidence of scores of witnesses and the advice of many experts.

## Language

I have tried wherever possible not to use the language of certainty. Rather, probability, likelihood, and reasonable inference are the tools I am comfortable using, particularly when dealing with the fragility of memory, the nuances of human perception, and the lure of hindsight. In this respect, I adopt the methodology of Mr. Justice Dennis O'Connor in the Walkerton Commission of Inquiry:

Because this is not, strictly speaking, a legal proceeding, in certain cases I have not made “findings of fact” based either on a balance of probability (the civil test) or on proof beyond a reasonable doubt (the criminal test). Instead of making findings of fact, in some instances I have set out my conclusions by expressing them in terms of the probability or likelihood of something happening or not happening. In some cases I increase the certainty of my conclusion by using the qualifier “very.” For readability, I use the words “probable” and “likely” interchangeably. One should not read a different meaning into the use of the two different words in similar contexts.<sup>3</sup>

I have, however, found it necessary on a number of occasions to attribute responsibility, ascribe fault to, and describe misconduct by specific individuals. These actions are usually necessary to the logical development of this Report’s narrative, to its conclusions, and to the foundational component of its recommendations. I wish to make it clear that they are not to be construed as legal conclusions or recommendations regarding civil, criminal, or quasi-criminal liability.

## Mandate

A commission of inquiry is established by the government to inquire into and report on certain matters set out in its mandate. It is essential for any commission to understand exactly what its mandate is – because its inquiry and report must both meet its obligations and not go beyond them.

The Order in Council which established the Commission contains the following provisions:

2. ... the Commission shall:
  - a. Inquire into and report on events surrounding the collapse of the Algo Centre Mall in Elliot Lake, Ontario, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals in attendance at the mall and the emergency management and response by responsible bodies and individuals subsequent to the collapse;
  - b. Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity and safety of the Algo Centre Mall in Elliot Lake, Ontario;
  - c. Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the emergency management and response to the collapse of the Algo Centre Mall in Elliot Lake, Ontario.
- ...
12. The Commission shall endeavour to deliver a final report containing its findings, conclusions and recommendations to the Attorney General ...



The language of the mandate with respect to the legal framework and practices I have been directed to review, and the recommendations I have been asked to make, is ambiguous. Interpreted narrowly, it would restrict the Inquiry to an examination of the legal framework and practices with respect to the structural integrity and safety of only the Algo Mall, along with the emergency management and response to the collapse of only the Algo Mall. Interpreted broadly, it would require me to examine the legal framework and practices with respect to the structural integrity and safety of all buildings in the province of Ontario, and the emergency management and response to all emergencies in the province. I have concluded that my mandate requires me to steer a middle course between these two extremes.

Interpreting subsidiary legislation, such as the Order in Council that established this Commission, requires what courts have called a “purposive analysis.” Insofar as the language permits, interpretations that are consistent with or promote the legislative purpose should be adopted, while interpretations that defeat or undermine the purpose are to be avoided.<sup>4</sup>

The specific issue of interpreting an order in council establishing an inquiry to determine the extent of the commission’s mandate has arisen in other inquiries. The Ontario Court of Appeal, in a 2008 case arising out of the Cornwall Inquiry, set out the factors to be considered. The court held that, where the language used in the order in council is unclear or ambiguous, the mandate must be interpreted by considering the words “harmoniously and with reference to the document as a whole,” and by going beyond the words of the order in council and considering the context and circumstances in which the commission was established.<sup>5</sup>

It is clear from paragraph 12 that the Order in Council for this Commission requires that I make recommendations, although the precise subject matter of the recommendations is not as apparent from the language as it was in the orders in council that established other commissions.

The Order in Council establishing the Inquiry into Pediatric Forensic Pathology in Ontario required the commission to

... conduct a systemic review and assessment and report on ...

- a. the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings;
- b. the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 to [sic] 2001

...

*in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.*<sup>6</sup> [Emphasis added.]

The Order in Council that created the Walkerton Inquiry in 2000 used similar language, directing the commission to inquire into

- (a) the circumstances which caused hundreds of people in the Walkerton area to become ill ...
- (b) the cause of these events including the effect, if any, of government policies, procedures and practices; and
- (c) any other relevant matter that the commission considers necessary to ensure the safety of Ontario’s drinking water,

*in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply in Ontario.*<sup>7</sup> [Emphasis added.]

The language in these orders in council explicitly sets out the requirement for, and the subject of, recommendations from the two commissions.

A purposive analysis makes it clear, however, that commissions of inquiry established under the *Public Inquiries Act, 2009* (of which this commission is the first) are created for the purpose of obtaining recommendations about the matters into which they are directed to inquire. The new statute contains a “purpose” section that provides:

1. The purpose of this Act is to establish an effective and accountable process for public inquiries where there is a public interest to,
  - (a) independently inquire into facts or matters;
  - (b) make recommendations *regarding those facts or matters*.<sup>8</sup> [Emphasis added.]

There is no similar provision in the earlier statute,<sup>9</sup> which arguably required specific language in the orders in council establishing commissions to set out the obligation to make recommendations and, in addition, the subject matter of those recommendations. That omission would explain the more detailed and specific reference to recommendations required from the Pediatric Forensic Pathology and the Walkerton inquiries.

It is also clear from the Attorney General’s statement in the legislature when the *Public Inquiries Act, 2009*, received first reading that one of the purposes of the statute was to allow for the creation of commissions of inquiry that would make recommendations about the issues into which they have been appointed to inquire. He stated:

[W]hen a government decides when a public inquiry is going to be called, what you’re looking for are a series of recommendations to address specific issues that can be received in time to be of benefit to society, to the government, to the Legislature. There needs to be a connection between the calling and the receipt of the recommendations in order for them to be beneficial.<sup>10</sup>

Specific provisions of my Order in Council support the conclusion that the recommendations I am required to make be broadly based. They should consider the entire regulatory framework that was in place to ensure the structural integrity and safety of the Algo Mall and include suggestions regarding the ways in which this regulatory framework could be improved.

The analysis must start with the recognition that the Algo Mall was not a viable building at the time the Order in Council was drafted. Any recommendations I make will not render the Algo Mall safer or provide for an improved response to an emergency in that Mall. They can only assist with respect to safety in, and emergency responses to, other buildings in the province.

Furthermore, the Order in Council expressly authorizes me to consult broadly, beyond the confines of those who dealt directly with the Algo Mall. Paragraph 4 reads:

4. Where the Commissioner considers it essential and at his discretion, he may engage in any activity appropriate to fulfilling his duties, including:
  - ...
  - b. Conducting inter-jurisdictional research to identify practices and successes in other jurisdictions that are relevant to the Ontario experience;
  - c. Consulting with or seeking submissions from key stakeholders and sector experts[.]



The recognition that I may identify “practices and successes in other jurisdictions that are relevant to the Ontario experience” and consult with “key stakeholders and sector experts” suggests that it would be appropriate for me to consider the regulatory scheme for the structural integrity and safety of buildings like the Algo Mall throughout Ontario and elsewhere, and to consult stakeholders and experts such as the Professional Engineers of Ontario, the Association of Municipalities of Ontario, and the Ontario Building Officials Association. Since the Order in Council contemplates my seeking submissions from persons and groups such as these associations, the lieutenant governor in council must have expected that my consultations would go beyond the specific circumstances of the Algo Mall. As such, they would relate to the entire gamut of regulatory measures which are, and which could be, in place to ensure the structural stability and safety of buildings like the Algo Mall, as well as an appropriate response to emergencies in similar buildings.

This analysis leads me to the conclusion that my mandate is to produce recommendations that will help to prevent tragedies like the collapse of the Algo Mall from occurring in the future and to assist in improving the response to such emergencies if and when they do occur. The Algo Mall is no more. Any recommendations I make will affect other buildings only.

I recognize that the laws governing structures in Ontario different than the Algo Mall did not play a role in the collapse. Although I will make recommendations relating to the laws and procedures relating to all structures that are generally similar to the Algo Mall in terms of construction, vocation, and purpose, I will also recommend that the government consider applying them, at least in part, to all buildings when public safety is at stake.

The Commission has carried out its activities in a way that makes it plain it was considering not only the propriety and efficacy of all aspects of the regulatory scheme which affects buildings like the Algo Mall, but also the broad recommendations for change that need to be made to parts of that regulatory scheme. I directed that advertisements be placed in the *Globe and Mail*, the *Sudbury Star*, and the *Lawyers Weekly* to advise the public that the Commission was considering making a number of recommendations as follows: mandatory minimum property standards for all buildings in the province; mandatory periodic inspection of all buildings in the province (by the owner, the province, or the municipality in which the buildings are situated); increased powers for all building officials in the province to make orders with respect to buildings that are or could become unsafe; improvements in the training of all building officials and property standards officers; and requests to the Association of Professional Engineers of Ontario to toughen its standards in respect to licensing professional engineers who conduct structural inspections, the nature of the investigation that must be made for such inspections, and the material to be included in all reports of such investigations. The Commission also advised the public in these advertisements that it was considering broad issues relating to emergency response, including the role of the province generally, and the Ontario Provincial Police and the Ontario Fire Marshal specifically, in managing rescues as well as search and rescue resources; whether communities are adequately supported by the province; whether there is adequate oversight of local preparedness; whether the *Occupational Health and Safety Act*<sup>11</sup> should specify the powers of Ministry of Labour inspectors in an emergency; how sites far from Toronto, especially in Northern Ontario, could and should be accessed more quickly; and the role of engineers generally, and Ministry of Labour engineers specifically, in emergency responses.

We received input during the roundtable policy discussions from not only those stakeholders specifically invited to take part but also from those (such as the Large Municipalities Chief Building Officials in Ontario) who chose to make submissions. None of those responding suggested that the Commission was straying beyond its mandate in considering these potential recommendations and broad issues. The Government of Ontario

took an active role in those discussions by explaining the format and basis of the existing regulatory scheme, and its representative stated on more than one occasion that the government expected that the Commission would make broadly based recommendations. Brenda Lewis of the Ministry of Municipal Affairs and Housing, for example, said:

I am sure that based on the discussion today you are considering whether or not a recommendation to Government will be to look at mandatory regulations for existing buildings; and that is something Government would consider based on the recommendations.<sup>12</sup>

All Participants at the hearings and roundtables and all written submissions received by the Commission appeared, at least implicitly, to have recognized the validity of my making recommendations about, at a minimum, all buildings like the Algo Mall. None expressed a differing view. It appears to me this approach is the one most closely aligned with the spirit that animated its creation.

There is already a class of buildings encompassed by Ontario law which fits that description. Buildings exceeding 600 square metres in area or exceeding three storeys in height and used principally for “mercantile occupancy” (defined as the display or selling of retail goods, wares, or merchandise) must comply with the provisions of the *Building Code* relating to structural design, among other things.<sup>13</sup> The laws, regulations, policies, processes, and procedures governing the ongoing structural integrity of buildings of this description, and responses to emergencies involving the structural collapse of such buildings, will be the specific subject of my recommendations. Because mercantile occupancy necessarily occurs in a workplace, those laws include the *Occupational Health and Safety Act*,<sup>14</sup> which sets out provisions for the structural integrity of workplaces.

I hope the government will seriously consider applying my recommendations to all publicly accessible buildings and workplaces in the province. There are many good reasons to do so. The exchanges and comments at the roundtable policy discussions often went beyond the confines of large buildings used for mercantile occupancy to include high-rise buildings generally, and residential condominium buildings specifically, as well as ice arenas, places of assembly, and other structures. In my view, many of the issues raised by the history of the construction, occupancy, and collapse of the Algo Mall are equally applicable to other types of buildings. Public safety is at much at stake in a hockey arena or an office building as in a shopping mall. The issues that led to the collapse of the Algo Mall – inadequate or no inspection for structural safety, inadequate or no disclosure of potential structural issues to subsequent purchasers and public authorities, and inadequate or no exercise of regulatory authority – could as easily arise in these other buildings as they did in the Mall.

## The hearings

I gave Commission counsel wide discretion in the decisions relating to which witnesses to call and the presentation of the evidence. Indeed, I made the decision early on to refrain from a thorough personal examination of the evidence, the witness summaries, and the will-say statements in advance of the hearings, primarily because I did not want to skew or cloud my perception of the evidence as it developed. In addition, to avoid the perception of bias and to ensure an even-handed approach to proceedings, I determined to avoid my own questioning of witnesses except in cases where I needed to better understand the answers being given. I hope I was successful in achieving that goal, although I may have entered the fray on one or two occasions.

I also resolved from the moment of my appointment to avoid making any informal statements to the press or the public or giving any interviews, except for official comments, orders, or rulings on the record. I assigned Commission counsel and our director of communications the role of providing the public with information about the work of the Commission. I agree with Mr. Justice Willard Estey, who is quoted as saying, “I am a strong believer that silence is golden on the part of a commissioner or a judge.”<sup>15</sup>

## The narrative

The trick to writing well is to think before you write. My legal team and I have not had the luxury of time. We used too many words in the narrative portion of the report, and I apologize for that failing. As Blaise Pascal said (though often misattributed to Mark Twain): “Je n’ai fait celle-ci plus longue que parce que je n’ai pas eu le loisir de la faire plus courte.” [I made this [letter] very long, because I did not have the leisure to make it shorter.]

Nevertheless, the multi-dimensional reality of the 33 years of the Mall’s life is difficult to condense, if conclusions are to be fairly and accurately drawn. Witnesses brought unique perspectives to their involvement, few of which were totally synchronized. Some were markedly different. Indeed, during my judicial career I have found that perfect synchronicity is often the hallmark of fabrication. The account of those 33 years is therefore unfortunately long and occasionally repetitious. I thought it better to include too much rather than not enough.

## Summary of conclusions

Stated in the broadest of terms, my main conclusions in Part One are as follows:

- Two people died and approximately 19 were injured after a portion of the Algo Mall collapsed on June 23, 2012.
- The collapse was due to the sudden failure at 2:18 p.m. of a connection between one beam and one column of the steel substructure below the parking deck of the Mall.
- The failure was the result of the continual and uninterrupted ingress of water and chlorides from the parking deck of the Mall ever since its construction in 1979, resulting in severe corrosion of the connection.
- The ingress was the result of a faulty initial design combined with inadequate and incompetent maintenance and repair of the surface of the parking deck.
- There were many complaints over the years about the leaking deck and falling pieces of the ceiling.
- Municipal authorities ignored repeated complaints and warnings about leaks and material failure.
- Municipal authorities did not enforce, or improperly enforced, their own property standards by-laws. Some public officials were apparently unaware of the contents of their own by-laws. The municipality’s predominant focus was non-interference with the Mall – because it was regarded as the social hub of the community and as a major source of tax revenue and employment.
- Despite the involvement of the Ministry of Labour with the Mall during most of its existence, its employees never treated the leakage situation with much interest and concern.
- Some structural engineers failed to inspect the Mall properly. Engineering reports were of uneven quality, often drafted more with an eye to pleasing clients than proposing effective solutions or warning of potential dangers.



- Owners chose cheap and ineffective repairs or opted to sell the Mall when faced with significant repair bills. They actively concealed their knowledge of the parking deck's condition from the City and from subsequent purchasers.
- The last owner (Eastwood Mall) actively misrepresented the repair work it engaged in and resorted to subterfuge and falsehood to mislead authorities, tenants, and the public.

## **The residents of Elliot Lake**

I close by thanking the citizens of Elliot Lake. Their personal and collective sacrifices are recognized throughout this Report. This community, at both the official and the individual levels, has made me and all the members of the Commission feel welcome, appreciated, and at home in their beautiful and unique city. We will not soon forget them. I have no doubt that the resilience this city has shown so many times before in its short boom-and-bust history will help it once again to pick up the pieces from this tragedy.

## Notes

- <sup>1</sup> "McGuinty seeks inquiry into mall collapse; Bodies of two victims released to families," *Ottawa Citizen*, June 30, 2012, A6.
- <sup>2</sup> *Public Inquiries Act, 2009*, RSO 1990, c 33, Schedule 6, s 1.
- <sup>3</sup> Ontario, *Report of the Walkerton Inquiry* (Toronto: Ontario Ministry of the Attorney General, 2002), Part One, 37 (Commissioner Dennis R. O'Connor).
- <sup>4</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008), 255.
- <sup>5</sup> *Ontario (Provincial Police) v Cornwall (Public Inquiry)*, 2008 ONCA 33, [2008] OJ No. 153, paras 26–27, 51.
- <sup>6</sup> OC 826/2007.
- <sup>7</sup> OC 1170/2000.
- <sup>8</sup> *Public Inquiries Act, 2009*, SO 2009, c 33, Schedule 6, s 1.
- <sup>9</sup> *Public Inquiries Act*, RSO 1990, c P.41.
- <sup>10</sup> Ontario, Legislative Assembly, *Hansard* (November 2, 2009) at 1399.
- <sup>11</sup> *Occupational Health and Safety Act*, RSO 1990, c O.
- <sup>12</sup> Brenda Lewis, transcript, November 18, 2013, p. 55.
- <sup>13</sup> Ontario *Building Code*, O Reg 332/12, arts 1.1.2.2(2), 1.4.1.2.
- <sup>14</sup> *Occupational Health and Safety Act*, RSO 1990, c O.15
- <sup>15</sup> Quoted in E. Ratushny, *The Conduct of Public Inquiries* (Toronto: Irwin Law, 2009), 411.

## Background

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Nicknamed the Jewel in the Wilderness, the City of Elliot Lake is located in Northern Ontario, approximately halfway between Sudbury and Sault Ste. Marie and 20 minutes from the north shore of Lake Huron. The US–Canadian border is 180 km west of the city. The relatively remote northern community is surrounded by countless lakes and rivers, beautiful rolling hills, and the Boreal forest. Elliot Lake itself is a small one on the city's northern edge.

Elliot Lake is no stranger to collapses, adversity, and recovery, as seen in the following brief history. As well, this chapter includes a brief overview of how a building such as the Algo Mall is designed, built, and maintained in Ontario.

## History of Elliot Lake

Although modern-day Elliot Lake dates back only to the 1950s, the region has been inhabited for centuries.

Elliot Lake first appeared in 1910 on a Dominion Map. It is widely believed that the name Elliot belonged to a logging camp cook who drowned in the lake before that date. This part of northeastern Ontario's Algoma District is rich in folklore of the early Ojibway Nation, the fur trade, and, in later years, the vast logging operations that continued until 1950.<sup>1</sup> A seasonal Ojibwa village extended along the lake's shoreline near the present hospital.

**Modern-day Elliot Lake owes its existence to uranium mining. With the Second World War and the development of the atomic bomb came renewed interest in uranium. The discovery of a huge ore body of uranium in the Canadian Shield near Elliot Lake in the early 1950s ... prompted the "Back Door Staking Bee" in June 1953 that ultimately saw the opening of 12 uranium mines in the area.**

Modern-day Elliot Lake owes its existence to uranium mining. With the Second World War and the development of the atomic bomb came renewed interest in uranium. The discovery of a huge ore body of uranium in the Canadian Shield near Elliot Lake in the early 1950s – the so-called "Big Z" uranium field, a 100-square-mile corridor – prompted the "Back Door Staking Bee" in June 1953 that ultimately saw the opening of 12 uranium mines in the area. Eighty prospectors, along with geologists, lawyers, cooks, accountants, clerks, and secretaries, were assembled near the middle of the Big Z and told to stake quickly and

quietly. When they had finished, more than 1,400 claims covering 56,000 acres had been filed in one of the world's largest uranium discoveries.<sup>2</sup> According to a 1996 historical overview of the city

[t]he establishment of 12 uranium mines in a small area, in such a short time, had no precedent. The mines were identified, and some of them built, before there was any community to accommodate the avalanche of people who flooded into the area to work in them. Only in the fall of 1955 were plans made to house the workers of all 12 mines in a common townsite. This was quite unlike the prevailing practice of building a company town for each separate mine.<sup>3</sup>

The Ontario government decided Elliot Lake would be a well-planned permanent community and a role model for other towns. In October 1955, it created a special agency, the Planning and Development Department of the Ontario Ministry of Housing, to ensure the development of Elliot Lake as a viable community. The project combined the efforts of the federal and provincial governments, four mining groups, and 12 contracting firms. Architectural students at Cornell University in New York State designed the town plan.<sup>4</sup>

The town was built rapidly, and numerous mines were brought into production. By the late 1950s, Elliot Lake was complete.

Neighbourhoods of from 300 to 1,500 single-family residences had been built, each with schools, churches, parks, recreational facilities, shopping, and other services. There was a central downtown core for the entire community. All roads were planned on a circular pattern, to reduce speeding and allow for the eventual return to the main thoroughfares. By 1956, downtown Elliot Lake had a theatre, billiard hall, church, school, and banks, and construction continued. By 1958, the town was near completion, with a solid downtown business core, schools staffed and churches opening, streets being paved, street lights being installed, and the population nearing 18,000. With mine bunkhouses and trailer parks taken into account, the population was actually closer to 25,000.<sup>5</sup>

For 40 years, Elliot Lake was dubbed the “uranium capital of the world” and produced most of the world’s uranium. The principal mining companies were Denison Mines and Rio Algom. The local economy and population of this one-industry town increased and decreased along with the world’s demand and prices for uranium. Strong demand for uranium first came from the US military. The Canadian government had negotiated contracts with the US Atomic Energy Commission for more than \$1.5 billion in uranium oxide, with more than two-thirds of that total to be produced by the Elliot Lake mines.<sup>6</sup> Then, in 1959, the United States declared that it would buy no more uranium from Canada after 1962.

As a single-industry community, Elliot Lake experienced a dramatic downturn in its fortunes – from a high of 26,000, the population dropped to 6,664 by 1966. Five mines closed in 1960 alone. Residents erected signs declaring Elliot Lake “the world’s most modern ghost town,” and a delegation of housewives visited Ottawa in 1960 to plead with Prime Minister John Diefenbaker to save their town.<sup>7</sup> The expansion of the nuclear power industry in the late 1960s led to a renewed boom. A federal government uranium-stockpiling program initiated in 1966 by the Rt. Hon. Lester B. Pearson, the local Member of Parliament, kept the town alive until prices recovered.

During the 1970s, federal plans for CANDU (Canada Deuterium Uranium) reactors and Ontario Hydro’s interest in uranium led the town to expand again; Ontario Hydro signed long-term purchasing contracts with the mining companies in the 1980s.<sup>8</sup> In the early 1980s, the two mining companies that operated in Elliot Lake anticipated a boom in the world uranium market and therefore expanded the community’s infrastructure so it could accommodate a population of 25,000. Unfortunately, the boom did not occur – in fact, the reverse took place.

In January 1990, Rio Algom announced it would be closing two of its three remaining Elliot Lake mines. The closing affected 1,600 miners – about 25 percent of Elliot Lake’s workforce. That February, Denison announced it would lay off 650 workers because of low uranium prices. Between July 1 and December 31, employment in the town’s mining industry was nearly halved, and over the next several years the layoffs continued. In 1991, after Ontario Hydro announced it would no longer be buying uranium from Elliot Lake, Denison decided to close its operations there, costing 1,000 jobs. Stanleigh Mine, operated by Rio Algom and the last of the 12 uranium mines brought into production with money provided by Ontario Hydro, was to close in June 1996.<sup>9</sup>

The city was devastated and its future placed in jeopardy. Economic development agencies projected that, if the lost jobs could not be replaced, Elliot Lake's population would decline from 18,000 to 500 by 1996, with hundreds of housing units left vacant.<sup>10</sup> For more than 40 years

the words "uranium and "Elliot Lake" had been married to one another. It was impossible to think of the community without its uranium association, yet at the end of June 1996, the last active uranium mine was to close ... If Elliot Lake was to exist without uranium, it would have to find a new role. Its assets were good infrastructure and good houses set in a natural paradise of sparkling lakes, pristine beaches and unspoiled nature.<sup>11</sup>

Rather than close the city, Elliot Lake devised a new economic strategy: it would position itself as a retirement living community. Vacant homes were marketed and sold or rented to retirees. Non-Profit Retirement Residences of Elliot Lake was created in July 1991 as a non-profit corporation that owned and rented out more than 1,000 housing units. Thousands of new residents from Canada, the United States, and Europe stabilized the population and economy, which was now based on tourism, cottaging, retirement, and health care.<sup>12</sup> In addition, compensation related to the termination of Ontario Hydro uranium contracts was used to establish the Elliot Lake and North Shore Corporation for Business Development (ELNOS), a development agency that aimed to help support and diversify the local economy.

In January 1991, the provincial government officially proclaimed Elliot Lake Ontario's 15th city. In 2005, Elliot Lake celebrated its 50th anniversary. According to the 2011 census, Elliot Lake's population was 11,348 – practically unchanged since 2006 (11,549). However, the median age of the population was 57.1, up from 54.8 in 2006. (The median age in Ontario as a whole was 40.4). Ninety percent of the population of Elliot Lake was over age 15, and 45 percent was 60 or over.

**In January 1991, the provincial government officially proclaimed Elliot Lake Ontario's 15th city. In 2005, Elliot Lake celebrated its 50th anniversary. According to the 2011 census, Elliot Lake's population was 11,348 – practically unchanged since 2006 (11,549).**

A 1980 history of Elliot Lake, *Jewel in the Wilderness*, stated that the 1970s saw the development of the city's commercial sector to match the expanding industrial and population base. The book featured the new Algo Mall on its back cover and called the building "the crowning achievement in this trend," adding that the "town has been identifying just such a development for years and its construction is, in a sense, an affirmation of Elliot Lake's future security, a symbol of prosperity."<sup>13</sup>

The Mall also became an important element in the city's attempts to attract residents to its "active retirement community." Residents used it not only as a source of employment and shopping but also as a social destination and exercise and walking facility.<sup>14</sup> When the Mall collapsed in June 2012, the City of Elliot Lake suffered a significant economic blow – the loss of more than 200 jobs in a city where only 3,385 people were employed, given its position as a retirement-living community.<sup>15</sup>



In addition to the loss of jobs in the community, the city also lost an important source of tax revenue. Before 2012, the Mall paid annual municipal taxes of \$363,857. This amount was adjusted for the 2012 tax year owing to an assessment appeal. The assessment of the Mall was reduced from \$8 million to \$4.1 million, with a tax revenue \$182,489. The annual revenue from taxation for 2011 for the entire municipality was \$9,055,422, of which the Mall assessment represented 4 percent of the tax base. For 2012, the city's budgeted revenue from taxation was \$9,004,579, of which the Mall taxation represented 2 percent of the tax base. Thus, 2 percent of the municipal tax base was lost by the Mall assessment, and a further 2 percent of the tax base was lost as a result of the loss of the Mall.

The history of Elliot Lake is aptly summed up in a song written for the city's 50th anniversary and recently updated:

Back in 1955,  
A northern town had come alive.  
Men had come from all around,  
To get that uranium out of the ground.  
These were times of prosperity,  
A great time and place to raise a family.  
People worked and children played.  
Some came to visit, but instead they stayed.

Where do you go when you want to be with friends? Elliot Lake.  
Makin' the drive about 30 k up the 108, to Elliot Lake.

Boom turned to bust, then bust to boom.  
These are the cycles of a mining town.  
But the cool, clean lakes and the crisp fresh air  
Are some of the reasons people choose to live here.  
Flora and fauna and the scenery  
Inspire my creativity.  
Where eagles soar so wild and free,  
It touches my heart, means a lot to me.

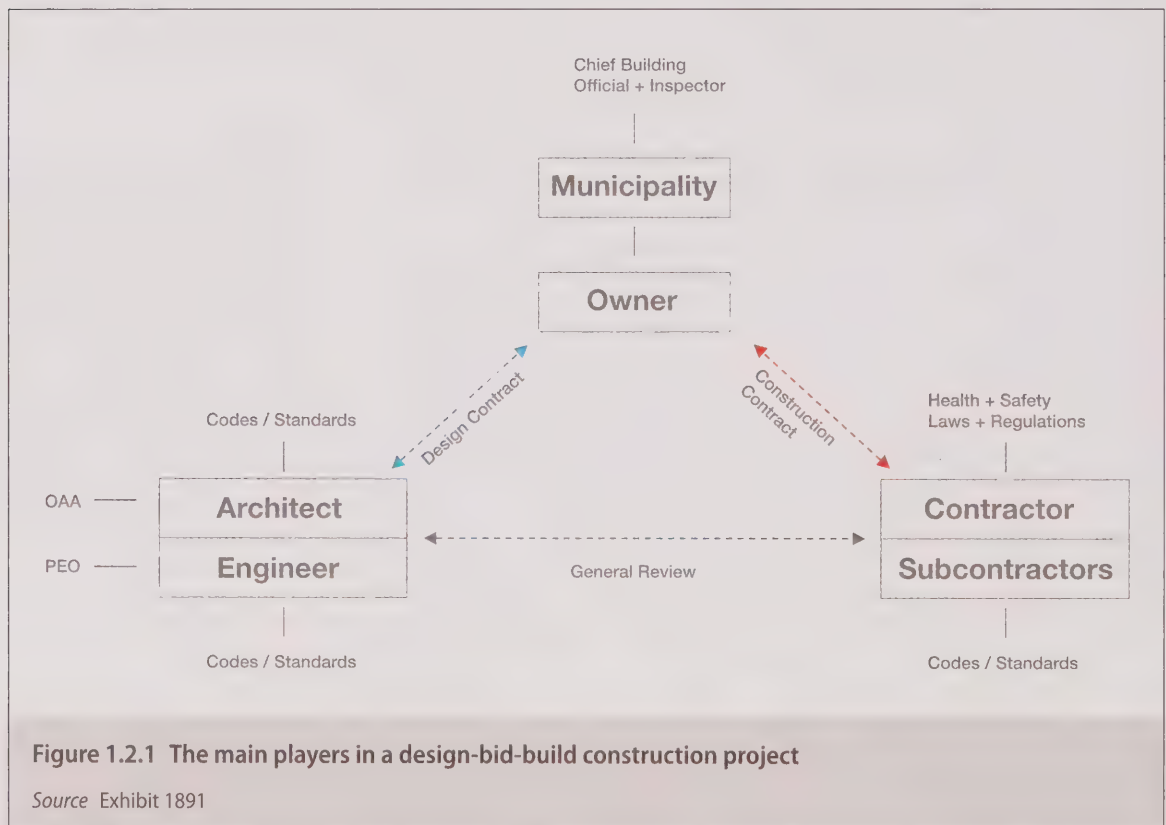
Where do you go when you want to be with friends? Elliot Lake.  
Makin' the drive about 30 k up the 108, to Elliot Lake.

Twenty-twelve was the year  
Disaster had reared its ugly head here.  
Some had died and many cried,  
And the news affected people far and wide.  
But the spirit lives strong in this community.  
We're full of faith and not of fear.  
We'll rebuild and persevere.  
For the next generation on this frontier.<sup>16</sup>

## The design, building, and maintenance of a large construction project in Ontario

This section outlines the general procedures involved in the construction of commercial buildings such as the Algo Mall. This description does not reflect the process actually followed prior to, during and after the construction of the Algo Mall. Unfortunately, due to the passage of time, little to no evidence was provided to explain what actually took place during the construction of the Mall. Instead, the following description should assist the reader in understanding what could or should have occurred.

Construction projects in Ontario vary widely in both size and shape, from ordinary residential construction to industrial, commercial, and institutional projects. This section describes the typical phases of a commercial construction project from the viewpoint of the key players: the owner, architect, engineers, general contractor, subcontractors, and municipality (see figure 1.2.1). All participants have overlapping roles and responsibilities to ensure that the building is structurally sound and safe for public use. The description that follows is largely based on the presentation and testimony of Dale Craig, an Ottawa engineer retained by the Commission as engineering consultant.\*<sup>17</sup>



\* Mr. Craig graduated from Carleton University in engineering in 1970 and shortly thereafter joined the J.L. Richards professional engineering firm, where he has worked for more than 40 years, practising as a structural engineer for 20 years before becoming chief structural engineer. For the past 20 years, he has been involved in project management for major and multidisciplinary construction projects: Craig testimony, March 5, 2013. A more complete biography appears in Appendix G.

## Owner

The owner of a project bears ultimate responsibility for ensuring that what has been built is structurally sound. If anyone is injured because of negligent or faulty construction, the owner could be held responsible. Also, if an owner fails to ensure that provisions of the Ontario *Building Code*<sup>18</sup> (OBC) are properly followed during construction, the owner could face prosecution under the Ontario *Building Code Act*.<sup>19</sup> Generally, the owner can fulfill its obligations by hiring the appropriate professionals to be responsible for the planning, design, and construction of the project.

## Architect

A licensed design professional, the architect is responsible for the aesthetics, appearance, and functionality of a building. Functionality includes such things as health and safety and general *Building Code* compliance. The practice of architecture in Ontario is regulated and governed by the Ontario Association of Architects and the *Architects Act*.<sup>20</sup> Architects are expected to operate in accordance with the guidelines and practices dictated by the Ontario Association of Architects.

The 1975 Ontario *Building Code*<sup>21</sup> provided that an architect *or* a professional engineer *or* a combination of both were responsible for the design of a building exceeding either 600 square metres in gross area or three storeys in height, such as a shopping mall. Today the Ontario *Building Code* clarifies that an architect *and* a professional engineer are responsible for the design of such a building, with each practising his or her discipline.<sup>22</sup>

The customary procedure in the construction industry – though not a legal requirement – is that an architect is retained by the owner to act as the “prime consultant” responsible for the overall design and coordination of the project, including the design of the building envelope. The design and installation of the waterproofing system for the roof is part of the building envelope. Structural, mechanical, geotechnical, electrical, and other engineering or specialty consultants are retained by the owner or the architect, as needed, to complete the design of the building to meet the OBC requirements. The architect, as prime consultant, is in a direct contractual relationship with the owner.

The prime consultant may also assist the owner with the tendering process, help qualify subcontractors, coordinate drawings and other documentation, oversee changes to the construction documents, and approve payments on the owner’s behalf. The architect and the engineering consultants are required by the OBC to provide general site review during construction in accordance with the performance standards set out by the Ontario Association of Architects and the Association of Professional Engineers of Ontario.<sup>23</sup>

Although the architect may have been designated the prime consultant, the architect is not responsible for producing detailed drawings for the structural elements of the building. The architect is involved in, and drives, the layout of the structure and other building elements and the choice of materials (wood, concrete, steel); however, the design details needed to meet the structural requirements in the OBC are to be completed solely by the structural engineer.

**A licensed design professional, the architect is responsible for the aesthetics, appearance, and functionality of a building. Functionality includes such things as health and safety and general *Building Code* compliance.**



In some situations, an engineer is retained by the owner to act as the prime consultant, responsible for the project's overall design and coordination. Just as when the architect is acting as prime consultant, the engineer or the owner (or both) will retain specialty consultants, including architects, to ensure that the design and construction of the building meet the OBC requirements. As prime consultant, the engineer is in a direct contractual relationship with the owner.

## Engineers

For a major construction project such as a shopping mall, the architect invariably requires engineering expertise to complete the design. The input of a structural engineer is required for the building's structure.

Other engineering disciplines, depending on the nature of the project, are hired to test the soil (geotechnical engineer); design the mechanical systems, such as heating and ventilation, fire protection, and plumbing (mechanical engineer); and design the electrical systems (electrical engineer). Although the term civil engineer is sometimes used to describe a generalist, civil engineering also describes the discipline that deals with the site as a whole. In particular, a civil engineer is responsible for the design of the water and sewer services, as well as drainage, grading, roads, and parking.

**For a major construction project such as a shopping mall, the architect invariably requires engineering expertise to complete the design. The input of a structural engineer is required for the building's structure.**

The engineering profession in Ontario is regulated and governed by the Association of Professional Engineers of Ontario (PEO) and the *Professional Engineers Act*.<sup>24</sup> To become a licensed member of the PEO and practise engineering in Ontario today, an individual typically needs a bachelor's

degree in engineering from an accredited university, as determined by the Canadian Engineering Accreditation Board, and at least four years of verifiable, acceptable engineering experience under the supervision of a licensed professional engineer. The candidate is also required to pass a professional practice examination on ethics, professional practice, engineering law, and liability. After the candidate successfully completes these requirements and submits the appropriate documentation, the PEO reviews the file, verifies references for the engineering experience, and determines if the candidate is qualified to be licensed. Once approved by the PEO, the licensed member may use the title "professional engineer" (P. Eng.) and sign and seal professional documents.

The PEO publishes practice guidelines on the various services that an engineer may be called on to deliver as a professional. Guidelines published by the PEO include

- Professional Engineers Providing Structural Engineering Services in Buildings<sup>25</sup>; and
- Professional Engineers Providing General Review of Construction as Required by the Ontario *Building Code*.<sup>26</sup>

These guidelines were not in place at the time the Algo Mall was constructed. However, they were in place at the time some of the inspections were carried out by the various engineers. All the practice guidelines published by the PEO are available on its website.<sup>27</sup>

Some of the other services offered by a structural engineer on a commercial construction project include:

- determining precise design calculations to establish member sizes for structural steel (steel beams, columns, etc.), design of reinforced concrete foundations, columns and slabs, design of reinforced masonry, precast concrete elements, etc.;
- preparing detailed design drawings meant to convey information to the contractor and structural subcontractors;

- defining the materials and procedures to be used in construction through contract specifications;
- reviewing shop drawings from the fabricator's engineer for the fabrication of steel beams, columns, connections, open web steel joists, precast concrete, reinforcing steel, etc.;
- providing periodic field reviews by the architect or engineer, or their delegate (these reviews do not necessarily occur at regular intervals but rather can occur as required to ensure that construction takes place according to plans and specifications);
- revising drawings throughout the process of construction to accommodate changes; and
- arranging for third-party testing to verify quality control of materials used in the construction of the project.

## General contractor

The general contractor is retained by the owner to undertake the construction of the building in accordance with the plans and specifications (construction documents) and other contract documents. It is common practice for general contractors to subcontract many or all components of the building process to subtrades and suppliers (subcontractors). The general contractor's duty is to act as a coordinator and ensure that all subcontractors perform their work in accordance with the plans and specifications and that the work is carried out according to the provisions of the relevant health and safety legislation.

## Subcontractors

A significant number of subcontractors may be involved in a large construction project. It is not unusual on a project to have a subcontractor for each division of the work (e.g., excavation, concrete and formwork, structural, mechanical, electrical, drywall, masonry and insulation, hardware, painting, or plumbing). Indeed, often the general contractor does little or none of the actual construction work, carrying out only the hiring, supervision, and coordination of the subcontractors. That said, coordination and direction of the many subcontractors is essential and sometimes complex and difficult.

## Municipality

A municipality plays a regulatory role in the construction of a commercial project. The municipality is concerned mainly with ensuring that local zoning requirements are met and that the buildings conform to the applicable *Building Code*. Pursuant to the province's *Building Code Act*, municipalities are responsible for the enforcement of the Act and the OBC through the building permit review (plans examination) and inspection processes. Plans examination and inspection services are undertaken by the chief building official (CBO) and such other building officials as may be necessary. The *Building Code Act* provides that the CBO and other building officials are not permitted to perform their duties unless they have the qualifications set out in the OBC.

Although large cities such as Ottawa and Toronto generally have engineers on staff, smaller municipalities (including Elliot Lake and those similar to it) do not normally have a staff engineer to review building design drawings. Municipalities without an engineer on staff may choose to contract out the municipal building inspections to local engineering firms.

## The construction project

### Choosing where to build

Before starting a project, the owner needs to determine:

- the size of property required;
- the existing zoning for the selected property;
- the municipal parking requirements for the planned commercial development and the setbacks dictated by the zoning by-law;
- the green space and/or other amenities required to be included around the building; and
- the availability of services such as water and sewer.

Once a location has been selected, the owner may need to obtain a survey of the property to determine its legal boundaries, identify any encumbrances or easements on the property that could make it unsuitable for the proposed construction project, and establish what zoning by-laws apply in order to determine whether the project is feasible. The owner may also need to apply to the local municipal government to amend the zoning for the property to allow the project to proceed.

A prudent owner will hire a geotechnical engineer to determine the ground conditions, such as the depth and location of the bedrock, the water table, and the suitability of the soil for construction. This investigation usually involves drilling or digging test pits to sample the soil. The resulting report should include recommendations for the design of the footings and the building's foundation along with detailed information on the properties of the soil and/or bedrock. The report should provide the information needed to determine the type of shoring required for the excavation.

Depending on the historical use of the property, an environmental assessment may be required to determine if any contaminants are present at the site and the level of cleanup, if any, needed. If a site is found to be contaminated, it will have to be remedied in accordance with the applicable legislative and regulatory requirements before any construction can start. When the lot has had a previous use, environmental assessments are often conducted before the purchase of the land; or at the least, a prudent owner will make obtaining such an assessment a condition of the purchase.

### Choosing the prime consultant

The next step for the owner is to choose the person or team that will design the building. As noted, the OBC requires that all buildings used for "assembly occupancy" and those over 600 square metres or three storeys high used for business and personal services and mercantile occupancy, such as a shopping mall complex, be designed by an architect and a professional engineer. Each professional provides services according to the expertise required. The owner determines which one of the two will lead the design and coordinate the work of the other professionals on the team as "prime consultant." The prime consultant is the owner's primary contact for the design and contract administration process.

The term prime consultant is not defined in the *Building Code Act*,<sup>28</sup> the *Building Code*,<sup>29</sup> the *Professional Engineers Act*,<sup>30</sup> or the *Architects Act*,<sup>31</sup> although the last two statutes provide that a professional engineer or an architect may act as a prime consultant for the construction, enlargement, or alteration of a building.<sup>32</sup> Nor are the role and responsibilities of a prime consultant outlined in any of these Acts or their regulations.



The full design process for a large project usually involves an architect, engineers, surveyors, and other design and testing specialists. It includes a process of repeated reviews by building officials and approval agencies such as the Office of the Fire Marshal.

### The Ontario *Building Code* and by-laws

The Ontario *Building Code*<sup>33</sup> applies to all construction within an Ontario municipality, and it must be enforced by the designated chief building official for the municipality. Municipalities often supplement *Building Code* requirements with by-laws dealing with land use and building construction. These, too, are enforced by the municipality through the site plan control and building permit process.

### Conceptual design

The design process begins with the conceptual design. It provides the general layout and size of the proposed building, including the facade, elevations, orientation on the site, and building materials to be used to carry out the architect's vision of the building. The conceptual design is reviewed in detail with the owner and used to establish a preliminary budget for the project. At this stage, several versions of the design concept may exist.

### Site plan and approval process

Before completing the detailed design, the architect and/or civil engineer create a site plan that shows the placement of the building and its position relative to property boundaries. The site plan also sets out additional details such as site grading and drainage, building elevations, parking, sidewalks, curbs, entrances from the roads, site services (sanitary, water, septic, gas, power), lighting, landscaping and vegetation, fire hydrants, manholes, catch basins, and stormwater management. If this work is led by a civil engineer, it requires careful consultation with the owner to ensure that the owner's needs are met; with the architect about the building (orientation, size, etc.); and with the other engineers who need to design the systems that are fed by the services that enter the building.

Section 41(4) of the *Planning Act* provides:

No person shall undertake any development in an area designated under subsection (2) unless the council of the municipality or, where a referral has been made under subsection (12), the Municipal Board has approved one or both, as the council may determine, of the following:

1. Plans showing the location of all buildings and structures to be erected and showing the location of all facilities and works to be provided in conjunction therewith and of all facilities and works required ... including facilities designed to have regard for accessibility for persons with disabilities.
2. Drawings showing plan, elevation and cross-section views for each building to be erected, except a building to be used for residential purposes containing less than twenty-five dwelling units, which drawings are sufficient to display,
  - (a) the massing and conceptual design of the proposed building;
  - (b) the relationship of the proposed building to adjacent buildings, streets, and exterior areas to which members of the public have access;
  - (c) the provision of interior walkways, stairs, elevators and escalators to which members of the public have access from streets, open spaces and interior walkways in adjacent buildings;
  - (d) matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality;

- (e) the sustainable design elements on any adjoining highway under a municipality's jurisdiction, including without limitation trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality; and
- (f) facilities designed to have regard for accessibility for persons with disabilities.<sup>34</sup>

Once the site plan drawing is complete, it is submitted by the prime consultant on behalf of the owner to the appropriate person within the municipality for approval, in accordance with section 41(4) of the *Planning Act*. During the site plan review process, the municipality considers issues such as building placement, parking, site access, drainage, and site services and their compliance with the zoning by-laws and standards in effect at the time.\* The comments and concerns raised by the municipality during this process may lead to further revisions in the site plan. The municipality may also have to deal with a variance request from the owner to accommodate the project.

When the municipality has approved the site plan, a site plan control agreement<sup>†</sup> is signed by the owner and the municipality and registered on title.

## Detailed design

After the owner has reviewed the budget and the feasibility of the project, a detailed design is prepared. The architect and the different engineers need to work together, contributing their individual expertise to the overall design.

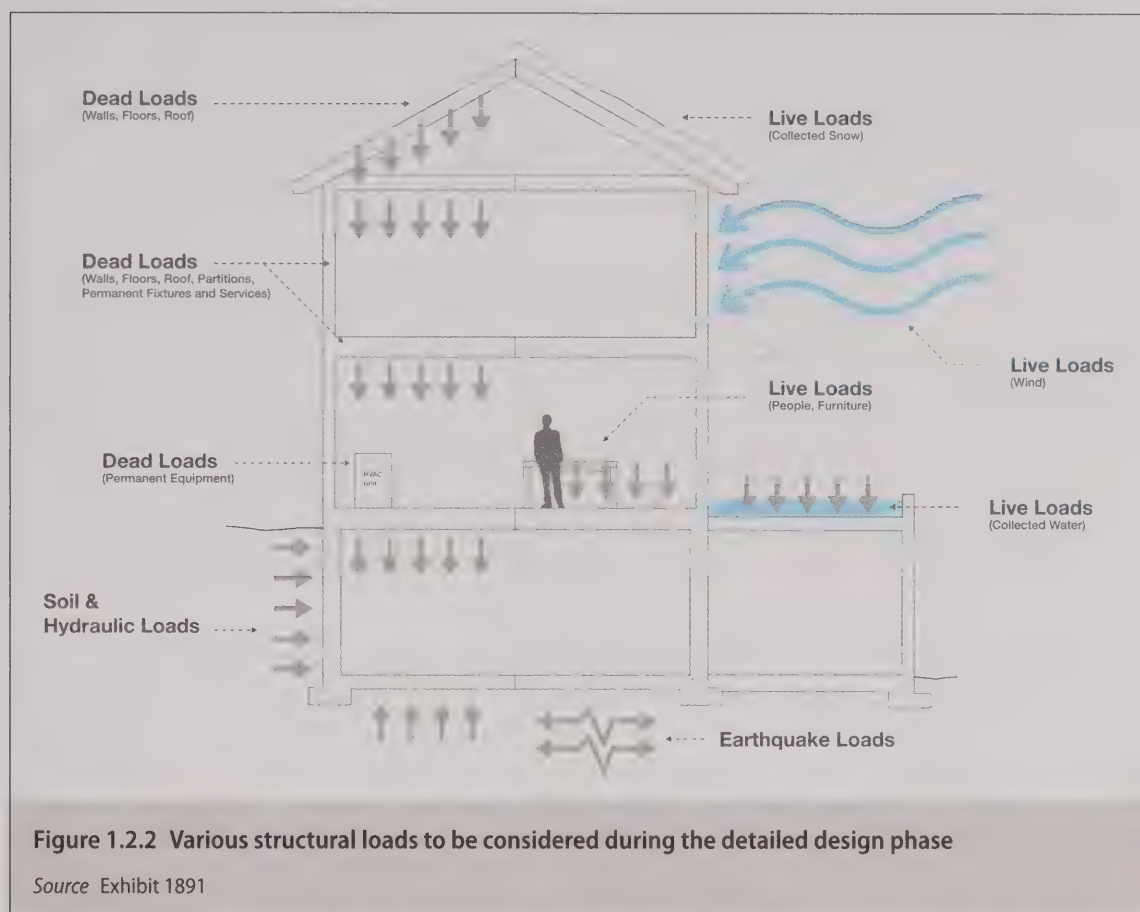
The engineer responsible for the structural design of the building calculates numerous loads and load combinations to ensure that the structure can perform its required function under a variety of conditions. Several types of load calculations are considered at the detailed design stage (see figure 1.2.2). “Live” loads are the estimated weights of the things and the people using, occupying, and filling up the space in the building at any given time. This calculation could include, for example, “live” loads from people, vehicles and furniture. “Dead” loads – the weights created by all the building components (steel beams, concrete slabs, etc.) and permanent equipment – are also considered at this stage.

In addition to calculating the live and dead loads, the engineers have to consider the loads created by climatic influences such as wind, snow, rain, and ice. These loads vary according to the location of the project site and the orientation of the building. Seismic conditions are also considered and calculated for the specific site. For example, at a site in Northern Ontario, where buildings are often built on the bedrock of the Canadian Shield, seismic effects are less of a concern than in the southern part of the province, but wind effects more strongly influence how the building is designed. Seismic and wind loads are lateral loads that require particular consideration in the design of a building.

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\* Section 3(12) of City of Elliot Lake By-law No. 06-99 (Building By-law) provides that, where a building location survey is not available, site plans shall be submitted which are to include the information prescribed by s. 41(4) of the *Planning Act*.

† A site plan control agreement is required only where the municipality has implemented and designated an area as a site plan control area (s 41(2) of the *Planning Act*). The City of Elliot Lake requirements for site plan control agreements are set out at section 7.15 of By-law No. 06-94, being a by-law to a By-law to adopt an Amendment to the Official Plan No. 98-22 of the City of Elliot Lake.



The structural engineer will calculate these different loads and choose the strength, size, and orientation of the steel, concrete, and other structural elements of the building to ensure that it is designed according to the applicable Ontario *Building Code* requirements. The Ontario *Building Code* includes a complete list of climatic conditions and wind pressures, earthquakes, seismic factors, and ground-snow loads that the engineer must consider in the design calculations. This list is specific to the individual communities in the province. Where a community (such as Elliot Lake) does not appear in the list, the engineer must use the information provided for neighbouring communities in order to triangulate and determine the applicable loads to be used in the design. The design addresses not only the strength of the various elements but also the resulting comfort for people using the building (for example, by ensuring that floor vibrations from footfall are limited).

At the same time, the mechanical, civil, electrical, and other engineers are designing their systems for construction in accordance with the various applicable codes, by-laws, and standards.



## Building permits

Building permits are the primary link between the *Building Code* and individual construction projects.

An approved project may not begin construction unless it is authorized by a building permit issued by the municipality through its chief building official. With larger commercial buildings, however, the municipal official tends to rely on the architect and engineers to ensure that the proposed building complies with the Ontario *Building Code*.

The municipality usually receives the building permit application just before or during tendering, though it sometimes receives it shortly afterward. The permit application includes commitments from the owner and the design team to undertake the necessary responsibilities for the project. These responsibilities include, but are not limited to

- the owner retaining a licensed professional architect and/or engineer to coordinate the design work and general review; and
- the licensed professional architect and/or engineer conducting a general review of the construction to confirm that the work has been carried out in general conformity with the plans and specification for the project and in accordance with the requirements of the *Building Code*.

At this time, full sets of the design drawings are provided to the municipality's Building Controls Department and to the Fire Marshal's Office. Design calculations (such as load calculations) are not normally submitted during this process. Although some municipalities check the detailed drawings, others do not, relying on the expertise of the design professionals to ensure that the integrity of the detailed design of the building. The *Building Code Act* includes a provision that chief building officials can, if they choose to, send drawings to the Association of Professional Engineers of Ontario or the Ontario Association of Architects for review.<sup>35</sup>

The municipality provides its comments and concerns about the drawings, which must be addressed by the owner, architect, and engineers. If the municipality is satisfied, the permit is issued. As noted, one important aspect of any building permit is the requirement for periodic reviews of the construction by each discipline for its part of the project.\*

## The tender process

In conjunction with finalizing the design and completing the building permit application, process, the owner must select a general contractor to construct the building. In putting out a call for tenders, the owner puts together a package that, if the project is going to proceed as a design-bid-build,<sup>†</sup> will include instructions to bidders, specifications, plans, supplementary general conditions, and, if any, geotechnical and environmental assessment reports. This package of documents is generally prepared by the prime consultant on behalf of the owner. The call for tenders can be a general call, open to any interested contractor, or the owner can choose to allow only invited or pre-qualified bidders to participate.

The tender process usually involves a site visit by the bidders to allow the design team to explain the project and permit bidders to ask questions. Questions can also be submitted in writing during the tender process. Answers

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\* Section 3.5 of City of Elliot Lake By-law No. 06-99 provides that applications for a permit to construct or demolish are to be in the prescribed form and must identify the designer who will review and take responsibility for the design activities.

† Design-bid-build is the traditional method of undertaking a construction project. There are three sequential phases to this method: (1) the owner retains a design firm to prepare the design documents (plans and specifications) for the project; (2) the design documents are used by the contractors and subcontractors to prepare their bids / quotations for the cost to complete the scope of work; and (3) the successful contractor and subcontractors construct the project in accordance with the design documents.

are distributed to all bidders as addenda to the contract specifications and form a legal part of the final contract document package.

Bids must be received at a predetermined location and are date- and time-stamped when received. If a bid package is received after the deadline, it is deemed non-compliant and cannot be considered by the owner. All bids received on time are reviewed for compliance with the requirements set out in the tender package and are ranked. A successful bidder is identified, and then a contract is entered into with the owner.

## Contract administration, testing of materials, and supervision

After the contract has been awarded and the building permit issued, the construction starts. At this stage, the owner or its representative needs to work closely with the architect, engineers, and general contractor to administer the contract. The administration of the contract includes dealing with issues arising during construction such as identifying interferences,\* discovering unknown conditions, and evaluating substitutions for products because of their lack of availability or long delivery times, as well as organizing and attending to documentation, distributing minutes from regular site meetings, and conducting a general review of the construction process.

During the construction, contemplated change notices, change orders, change directives, or site instructions may need to be issued in order to implement changes to the design or provide clarification on what is required for certain elements of the work. These materials are prepared and issued with the assistance of the owner's prime consultant and form part of the contract administration duties.

The role of the engineer continues even after the tender process is complete as the contractors and subcontractors begin their work. Architects and engineers are obliged under the OBC to review construction periodically to ensure that the general progress of construction proceeds in accordance with the design documents and that the quality of materials supplied on the project is as specified. This process is referred to as general site review. Sometimes, depending on the size and complexity of the project, a full-time reviewer is assigned to be on site, at the owner's expense. Often a local inspection company or testing firm is hired to do the inspections and provide written reports to the designers. At a minimum, the architect and engineers are expected to visit the site periodically to review progress of the work in their disciplines and to attend meetings with the contractor and owner.

The Ontario *Building Code* requires each discipline to review periodically its respective part in the construction project:

1.2.2.1(2) A person who intends to *construct* or have *constructed* a *building* or part of it required ... to be reviewed by an *architect*, *professional engineer* or both, shall ensure that an *architect*, *professional engineer* or both are retained to undertake the general review of the *construction* of the *building* in accordance with the performance standards of the Ontario Association of Architects or the Association of Professional Engineers of Ontario, as applicable, to determine whether the *construction* is in general conformity with the plans, sketches, drawings, graphic representations, specifications and other documents that form the basis for the issuance of a permit under section 8 of the Act or any changes to it authorized by the *chief building official*.

(3) The *architect*, *professional engineer* or both who have been retained to undertake the general review of the *construction* of a *building*, shall forward copies of written reports arising out of the general review to the *chief building official* or *registered code agency*, as the case may be.<sup>36</sup>

\* For example, determining whether the electrical conduits will interfere with the heating, ventilation, air-conditioning, or sprinkler system.

Ongoing review is necessary for a number of reasons. Unknown conditions may be discovered. Occasionally certain products cannot be found and must be replaced with suitable substitutes, and sometimes the architect or engineer must clarify the intent of the design for the contractors.

An important part of contract administration for the engineers is the assessment and control of the quality of materials being used in the construction. Not all steel beams and concrete slabs have the same quality and strength. Indeed, the engineer must take great care to specify the strength of the materials used in construction – based on load calculations – ensuring that they are strong enough to carry their expected loads. Any changes to material strength may be dangerous to the structural integrity of the building.

In terms of quality control, the contractor or subcontractors provide the engineers with shop drawings of the products being supplied under their contract. The design team reviews these drawings to ensure that the products meet specifications. Work may proceed only once these documents have been reviewed by the design team and returned with any comments to the contractor. In some cases, the contractor may propose to substitute an item for one that was specified in the contract. Such substitutions must always be approved by the design engineer because problems may be caused by a product of lesser or greater quality, or a change in configuration. It is generally the contractor's responsibility to prove to the architect's or engineer's satisfaction that a product is equivalent.

In addition to reviewing shop drawings and proposed product substitutions, designers also put in place a program to test the various materials as they arrive on site. For example, tests may be done on the compressive strength of concrete cylinders or on the tensile strength of steel samples. Wood products, masonry, mortar, and protective coatings are all sampled and tested. Typically, these tests are done by independent inspection and testing companies, and the results are reviewed by the design engineers throughout the course of the project.

At this stage, an engineer may be involved in reviewing and testing the mechanical and electrical systems and controls to ensure that they run according to design and manufacturing requirements. Finally, the design team does its last review before giving the approval for "substantial performance" and occupancy.

As mentioned, issues invariably arise during the construction process related to such things as unknown conditions and unavailability of materials. The contractor and subcontractors must work closely with the owner and designers to deal with these matters as well as reviewing the general progress of construction. In addition, contractors and subcontractors must comply with the applicable occupational health and safety legislation throughout construction. In Ontario, the *Occupational Health and Safety Act*<sup>37</sup> and its Regulations are rigorously enforced, and there can be significant penalties for any failure to comply with their requirements, whether or not an accident has occurred on the site.\*

## Commissioning and substantial performance

Before the owner has a finished project, the mechanical and electrical systems and controls in the building need to be reviewed and tested to make sure they run according to design and manufacturing requirements. This step is the commissioning process.

.....

\* Where the owner awards separate contracts to two different general contractors for different parts of the work, the owner becomes responsible for the coordination of the work between contractors and for ensuring that the work is carried out in accordance with the relevant health and safety legislation. (The owner becomes a "constructor" as defined in the *Occupational Health and Safety Act*.)



Typically, at this point as well, the owner's maintenance personnel are trained to operate and perform routine maintenance on the systems in the building. An operation and maintenance manual is prepared by the contractor according to the design criteria set out by the design team. The owner's staff must also be trained on fire, life safety, and exit systems.

The final step for the owner is for the contractor to be granted "substantial performance" on the project. This determination is made by the design team in accordance with the provisions of the Ontario *Construction Lien Act*.<sup>38</sup> The design team inspects the building thoroughly to determine what deficiencies there may be or how much work is left to be done and to make a professional determination on whether the building is ready to be accepted as substantially performed. If it is, the *Construction Lien Act* requires the contractor to advertise this substantial performance in the *Daily Commercial News* so that any suppliers or subcontractors who may have lien rights know when these rights expire and that they need to get their claims in before that date.

Once the design team signs off, notice is sent to the municipality's chief building official, advising that, in the opinion of the consultants, the building is ready for occupancy. That official and the fire department conduct their final reviews and, if all requirements have been met, the owner is given an occupancy permit to the premises.

The contractor continues to finish all outstanding work and correct any deficiencies noted, ultimately receiving a declaration of "completion" of the contract.

### Ongoing maintenance and review

All buildings require maintenance of their various systems over time, including the mechanical (heating, ventilation, air conditioning, fire suppression), electrical (lighting, data, controls, fire detection), civil (septic, water, sanitary), and structural and architectural (sealants, roofing and waterproofing membranes, windows, doors) systems. Typically, the mechanical, civil, and electrical systems require review at regular intervals (once or twice a year); the architectural and structural components of a building, in contrast, are often looked at only if a problem is brought to the owner's attention or a failure occurs.

If the owner undertakes major renovations, they must be carried out according to the *Building Code* requirements in place at the time, and not those that were in place when the building was first constructed. During a major renovation, some elements of the existing building may also need to be brought up to the requirements of the *Building Code* in place at the time of the renovation.

Under the Ontario *Building Code Act* and the Ontario *Building Code*, once a building such as a shopping mall has been completed and an occupancy permit issued, ongoing inspections by the municipality of the structural elements of the building are not required. Inspections of the structural elements generally occur only in response to specific complaints. The degree to which engineers and architects carry out ongoing maintenance and review of the structural systems in a building throughout its lifetime depends entirely on the owner. Typically, these procedures take place only if a problem is brought to the owner's attention or a failure occurs.

## Notes

- <sup>1</sup> <http://www.cityofelliotlake.com>
- <sup>2</sup> Anne-Marie Mawhiney and Jane Pitblado, eds., *Boom town blues: Elliot Lake, collapse and revival in a single-industry community* (Toronto: Dundurn Press, 1999), 22.
- <sup>3</sup> Catharine Dixon, *The power and the promise: The Elliot Lake story* (Elliot Lake, Ont.: Gillidix, 1996), xvii.
- <sup>4</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 23.
- <sup>5</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 23.
- <sup>6</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 22.
- <sup>7</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 24.
- <sup>8</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 24.
- <sup>9</sup> Mawhiney and Pitblado, eds., *Boom town blues*, 28.
- <sup>10</sup> Business Plan for the Purchase of the Algo Centre, Elliot Lake Retirement Living, March 1999, Exhibit 0007-00002.
- <sup>11</sup> Dixon, *The power and the promise*, 376–7.
- <sup>12</sup> City of Elliot Lake Community Profile 2008, Exhibit 00007-00001.
- <sup>13</sup> Elliot Lake Secondary School 455.02 Class, *Jewel in the wilderness, a history of Elliot Lake* (Elliot Lake, Ont.: Inter-Collegiate Press, 1980), 112.
- <sup>14</sup> Affidavit of Robert deBortoli, Exhibit 00007-00003.
- <sup>15</sup> Affidavit of Robert deBortoli, Exhibit 00007-00003.
- <sup>16</sup> <https://youtube.googleapis.com/v/damtlSsWmMY>. Music and lyrics by John R Cal.
- <sup>17</sup> Craig testimony, March 5, 2013, pp. 101–82.
- <sup>18</sup> Ontario *Building Code*, O Reg 332/12.
- <sup>19</sup> *Building Code Act*, 1992, SO 1992, c 23.
- <sup>20</sup> *Architects Act*, RSO 1990, c A.26.
- <sup>21</sup> O Reg 925/75, s 2.3.1(b).
- <sup>22</sup> Ontario *Building Code*, O Reg 332/12, Division C, Part 1, para 1.2.2.1.
- <sup>23</sup> Ontario *Building Code*, O Reg 332/12, Division C, Part 1, para 1.2.2.2.
- <sup>24</sup> *Professional Engineers Act*, RSO 1990, c P.28.
- <sup>25</sup> Guideline, *Professional engineers providing structural engineering services in buildings* ([Toronto]: Association of Professional Engineers of Ontario, 1995, rev. 12/11/98).
- <sup>26</sup> Guideline, *Professional engineers providing general review of construction as required by the Ontario Building Code*, prepared by Dick Seal et al. ([Toronto]: Association of Professional Engineers of Ontario, April 2008, rev. November 2008).
- <sup>27</sup> <http://www.peo.on.ca/>
- <sup>28</sup> *Building Code Act*, 1992, SO 1992, c 23.
- <sup>29</sup> *Building Code*, O Reg 332/12.
- <sup>30</sup> *Professional Engineers Act*, RSO 1990, c P.28.
- <sup>31</sup> *Architects Act*, RSO 1990, c A.26.
- <sup>32</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 12(6).8; *Architects Act*, RSO 1990, c A.26, s 11(4).8.
- <sup>33</sup> *Building Code*, O Reg 332/12.
- <sup>34</sup> *Planning Act*, RSO 1990, c P.13.
- <sup>35</sup> *Building Code Act*, 1992, SO 1992, c 23, ss 9 and 9.1.
- <sup>36</sup> Ontario *Building Code*, O Reg 332/12, Division C, Part 1, para 1.2.2.1 (2 & 3).
- <sup>37</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1.
- <sup>38</sup> *Construction Lien Act*, RSO 1990, c C.30.

SECTION

# II

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## Causes of the Collapse



*The evidence before this Commission is clear that the waterproofing of the roof failed virtually from the outset. The logical course of action would have been to undertake early and effective remedial measures to protect a valuable asset. Successive owners neglected to do so, and the consequences of that neglect were tragic.*

## Causes of the Collapse

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## Overview: A rusted weld lost its strength

On June 23, 2012, at 2:18 p.m., a portion of the parking deck level of the Algo Mall collapsed into the retail space below. Following the collapse, the Ontario Provincial Police (OPP) began a criminal investigation and retained NORR Limited (NORR) to carry out a forensic investigation into the cause.<sup>1</sup> NORR is a multidisciplinary firm composed of architects, engineers, and planners.

The NORR team was asked to provide a picture of the condition of the Mall before and at the time of the collapse. In its final report, NORR also commented on the previous reports and inspections that had been carried out by various engineering firms throughout the life of the building. This chapter will not look at its findings and opinions on the adequacy of those inspections and reports but, rather, will consider the conclusions it arrived at in its determination of the cause of the collapse. The Commission did not retain its own expert to determine the cause of the collapse.

In order to fulfill its mandate, NORR assembled a team of in-house professionals which included the following experts:

- Hassan Saffarini, P. Eng., PhD, structural engineer and team leader;<sup>2</sup>
- Michael de Raaf, master of applied science, structural engineer;
- Christopher Hughes,<sup>3</sup> bachelor of environmental studies, member of the Royal Architectural Institute of Canada, member of the Ontario Association of Architects, architect and building envelope specialist; and
- Christopher Pal, P. Eng., electromechanical engineer.

NORR also retained external experts in concrete, metallurgy, and corrosion: Pouria Ghods<sup>4</sup> of Giatec Scientific Inc. (Giatec), Aaron Dinovitzer<sup>5</sup> of BMT Fleet Technology (BMT), together with the National Research Council of Canada (NRC).

In addition to preparing an extensive report, four of the experts involved in the investigation testified as a group before the Commission to explain their findings.<sup>6</sup> During their testimony, these experts, who will be referred to at various points in the Report as the NORR Panel, also addressed the alternative theories advanced by some of the other Participants. The members of the NORR team were accepted by the Commission as highly qualified professionals and experts in their respective fields (engineering and architecture). None of the other Participants challenged their expertise.

As part of their investigation, some of the members of the NORR team visited the site of the collapse between July 21 and July 29, 2012. By the time they arrived, the area of the collapse had been partially cleared and demolished during the rescue operations to facilitate access to the two victims and to secure and stabilize the building. The NORR team did not participate or assist in the demolition.<sup>7</sup>

To help illustrate the events of the collapse, the NORR team produced an animated video, which was shown during the hearings. The narrative heard on the video provided the following account:

The Mall was beset with a chronic leaking problem from the day it opened. This went unabated due to the lack of a proper continuous waterproofing membrane at the parking level. Every owner addressed the leakage problem by attempting to seal and reseal cracks where leakage was observed. Water leaked onto the structural steel, carrying with it the de-icing salt that accelerated corrosion rates to levels only found in marine environments. Corrosion progressed likely since the Mall was built, until there was so little material left in one particular connection that it could no longer support the weight of the parking deck. On June 23, 2012, failure occurred in this steel connection which is located just below the deck

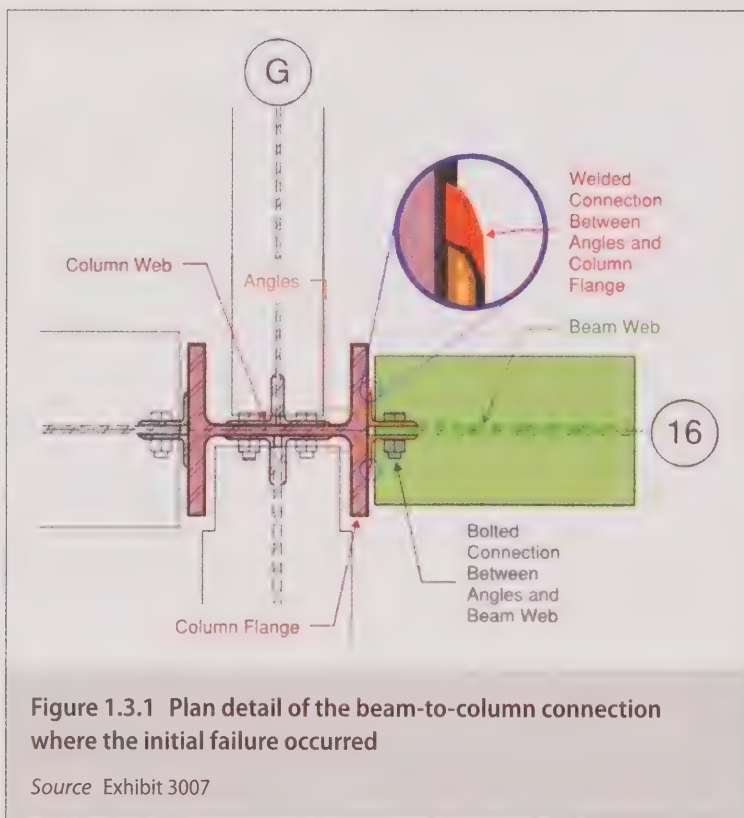
opposite the roof top hotel entrance. Without support, the concrete panels collapsed into the upper mall adjacent to the food court. The impact of the hollow core panels killed two people and caused a second connection failure in a steel beam supporting the pre-cast panels of the upper mall. A portion of the upper mall framing then collapsed into the ground level. The failure initiated in the welded connection between two steel angles and a column. By the time of failure, it is estimated that more than 85% of the original weld capacity of the failed connection had been lost to corrosion.<sup>8</sup>

## Description of the collapse

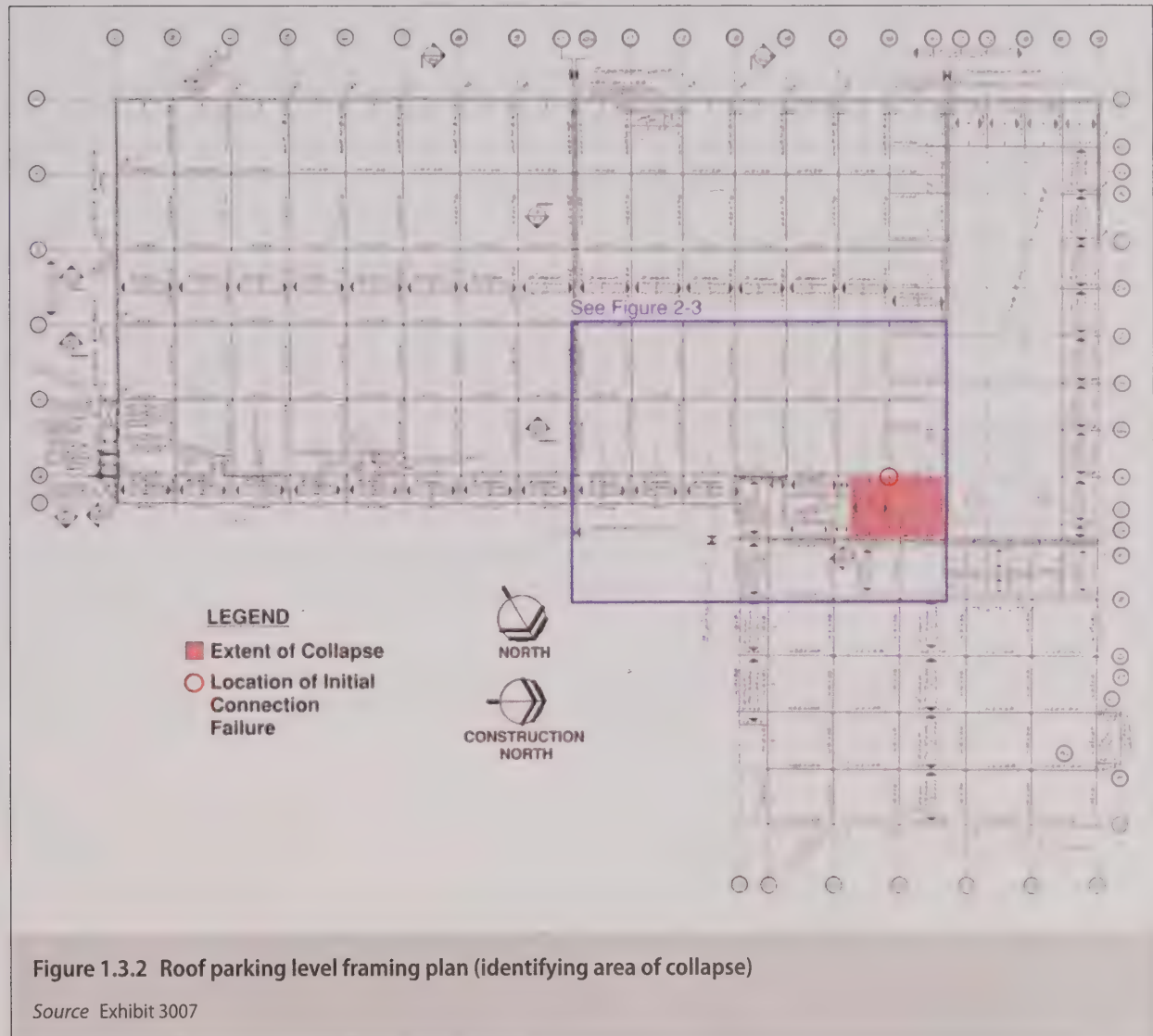
In its final report, dated March 8, 2013, NORR described how the collapse occurred:

On June 23, 2012 a portion of the parking deck level of the Algo Centre Mall collapsed into the retail space below. The collapse initiated due to a failure of a beam to column connection supporting the parking deck HCS [hollow core slab]. The steel framing for the extent of the area affected by the collapse at the parking deck level is provided in Figure 3-1. The connection which failed consisted of two steel angles bolted to the web of the W24x110 beam running along gridline 16 and welded to the flange of the column at gridline intersection G-16. The failure occurred in the welded connection between the steel angles and the flange of the column.<sup>9</sup>

NORR also provided two diagrams of the failed beam-to-column connection and the location where the failure occurred (see figures 1.3.1 and 1.3.2).



The actual failed connection, which was ultimately tested and examined by BMT, had been removed from the site before the arrival of the NORR team. It had been stored at the police station in an environmentally controlled location.<sup>10</sup>





## The design of the Algo Mall met the requirements of the 1975 Ontario *Building Code*<sup>11</sup>

### NORR identified two key shortcomings and a number of design deficiencies

During its investigation, NORR reviewed the original drawings that had been prepared and used during the construction of the Algo Mall, as well as a number of other documents that had been preserved and maintained over the years in the files of the first owner, Algocen Realty Corporation (Algocen). The history of the construction of the Mall is outlined and reviewed extensively in Chapter 4, 1979–85: Construction and Early Years.

In its review of the original design and construction of the Mall, the NORR team identified two key shortcomings: the first was “the placement of a parking lot on the roof of a mall without providing sound waterproofing”; the second was the “structural insufficiency of the hollow core slabs” used in the construction of the deck of the parking deck.<sup>12</sup>

NORR also identified deficiencies in the design and construction of the rooftop parking, including

- lack of detail of the roof drains in the drawings;
- specifying the installation of what appeared to be custom-built expansion joints, which would have to rely on “perfect performance from sealants”;
- a slope in the roof which was so low that, if designed today, its intent would likely be to retain water for prolonged periods; not surprisingly, photographic evidence showed standing water present on the roof;
- the presence of expansion joints that compounded the effect of the low slope of the roof; and
- flashing detail around the base of the hotel walls which ignored the fact that the roof was doubling as a parking lot; the flashing was too low on the wall, and the lower wall was not adequately protected against vehicular impact or snow and ice buildup.<sup>13</sup>

## The design prepared by the engineer, John Kadlec, met the requirements of the 1975 Ontario *Building Code*

The structural drawings and the steel specifications were prepared by the structural engineer, John Kadlec of Beta Engineering. NORR reviewed Mr. Kadlec’s work and found that the structural drawings showed a “level of preparation, information and details” that appeared to “reflect the industry standards at the time of their production.”<sup>14</sup> NORR also concluded that the specified superimposed “live” and “dead” load of 120 pounds per square foot (psf) on the drawings for the rooftop and the interior appeared to be in general conformity with the 1975 Ontario *Building Code*.<sup>15</sup>

NORR also undertook a close examination of the steel beam that fell in the collapse. It determined that the beam had the necessary capacity to resist the loads specified in the drawings, though there were some design deficiencies in the beam due to “an apparent assumption by Beta Engineering of uniform loading[,] which was not the case.”<sup>16</sup> The beam was found to be carrying approximately 13 percent more weight than it was designed for, resulting in a reduction in the margin of safety typically assumed by design codes. NORR determined, however, that this diminished factor of safety had no bearing on the final collapse.<sup>17</sup> It confirmed, despite these design deficiencies, that the beam involved in the collapse did not fail. Rather, what triggered the collapse was the failure of the beam’s connection to the column.<sup>18</sup>

In brief, NORR concluded that the design of the beam that collapsed was sufficient and that the design of the structural steel did not contribute to the collapse.<sup>19</sup>

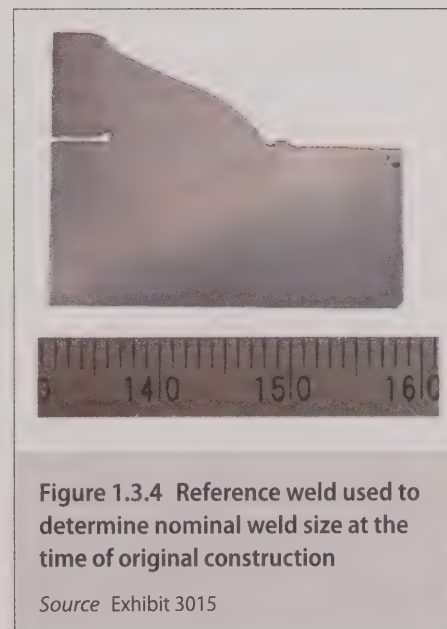
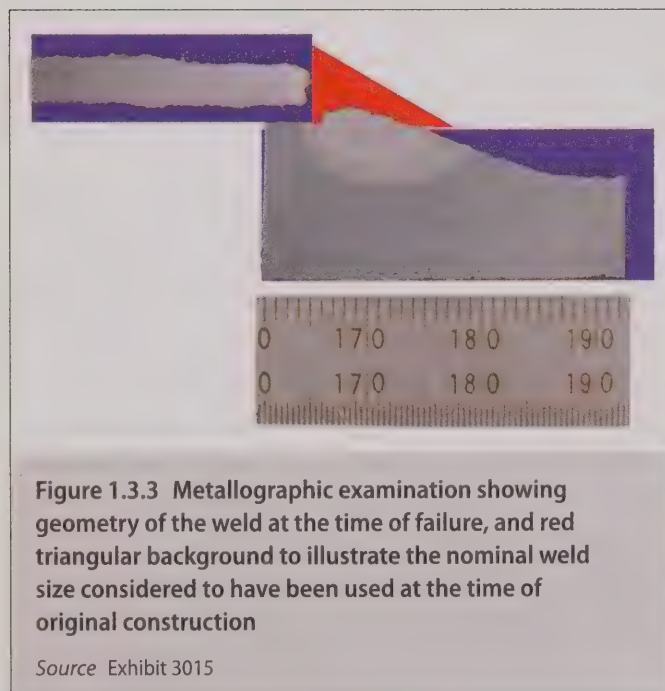
### The original as-built condition of the welds in the Mall met and exceeded the requirements in the specifications

In conducting its inspection and analysis, the NORR team considered whether the original welds had been deficient and could have contributed or led to the collapse. The shop drawings for most of the steel framing, including the failed connection, were not available for review by NORR or by the Commission. NORR therefore looked at similar connections in the Mall which were not corroded in order to gain insight into what would have been their original as-built condition.<sup>20</sup>

NORR was able to locate a connection in the Mall that showed almost no signs of corrosion (the “reference weld”).<sup>21</sup> Although this connection was significantly larger than the one that failed, the NORR team determined that it could use it for comparison purposes.<sup>22</sup> Mr. Dinovitzer of BMT was responsible for determining the likely as-built condition of the way the steel angle had been welded to the column of the failed connection.

The BMT report,<sup>23</sup> which is an appendix to the final NORR report, outlined both the process followed to compare the welds and the indicators used to determine the likely as-built condition in 1979–80 of the failed weld. The BMT report contains complex and detailed information on the process and the comparisons undertaken in this attempt. It explained that, during the welding process, the heat required to weld the metals together creates a heat-affected zone that can be seen through metallographic examination.<sup>24</sup> The contours of the heat-affected zones (also described as a “halo” in the BMT report) were used to determine the geometry (shape and size) of the original weld (see figure 1.3.3).

By comparing what would have been the geometry of the original weld to the other connections in the Mall, NORR determined that it was more than likely that the failed weld had been constructed in a manner similar to the reference weld (see figure 1.3.4).



BMT concluded that the weld of the failed connection in its original state would likely have been consistent with the Code requirements at the time of construction.<sup>25</sup> It found that, compared with today's standards, the original weld was generous and would have been using only 60 percent of the capacity for which it was designed. In other words, it was stronger than what had been specified, so there was a higher margin of safety. If the weld had not been corroded, there would have been no issue of its capacity.<sup>26</sup>

In light of the testing and analysis performed by NORR, its conclusions on the likely as-built condition of the weld, and its finding that the "as-built nominal capacity" of the weld "was significantly higher than that specified by design simply as a result of generous weld geometry by the original installer,"<sup>27</sup> I find that the connections and welds in the Mall, including the weld at the failed connection, had likely been properly constructed at the time of original construction.

### **Despite the shortcomings identified by NORR, the hollow core slabs did not contribute directly to the collapse**

The building was constructed with steel beams, columns, and pre-stressed precast hollow core concrete slabs that rested on the beams and served as the floor and roof of the parking deck. The engineer specified in the structural drawings that the hollow core slabs should be 8 inches thick and capable of carrying a superimposed load of 120 psf without a composite topping. In its report, NORR stated that this size was insufficient. Dr. Saffarini testified that the supplier, Coreslab, could have advised the engineer during the design stage that it would not be able to achieve the requirements of the specifications with the size of slab identified in the drawings. It could have suggested an alternative, such as supplying a 10-inch slab or adding a composite topping to the 8-inch slab.<sup>28</sup>

NORR reviewed the load tables published by Coreslab, which indicated that an 8-inch slab with a 31-foot span could not support 120 psf. NORR concluded that, in order to achieve the design requirements, a properly bonded concrete topping was required; without this topping, the hollow core slabs installed on the rooftop parking deck would have been structurally insufficient.<sup>29</sup> The analysis and findings of NORR on the structural sufficiency of the hollow core slabs are explored in greater detail in Chapter 4, 1979–85: Construction and Early Years.

The compressive strength of the hollow core slabs was tested and found to have met or exceeded the specified values they were designed for. The same test was conducted on the concrete topping, and its strength was also found to be above the design specifications. NORR had no issues with the strength of the concrete used in the construction of the Algo Centre.<sup>30</sup>

Although the concrete (both the slabs and the topping) met or exceeded the specifications, the concrete topping was found to have been extensively contaminated with chloride, presumably from the use of de-icing salts in the winter months. The chloride concentration in the concrete samples was well above the level where corrosion would begin in the steel mesh inside the concrete.<sup>31</sup>

Despite NORR's conclusion that the hollow core slabs were structurally insufficient, the team nevertheless concluded that the inadequacy of the hollow core slabs did not contribute directly to the collapse. Rather, their limited capacity had an indirect effect by improperly skewing the early attempts to stop the leaks and the corrosion that ultimately led to the collapse.<sup>32</sup>

During the Inquiry, it quickly became clear that the structural capacity of the precast slabs was a distraction and an excuse during the life of the Mall. All the Mall owners used the uncertainty about the capacity of the slabs to justify and rationalize their failure to take any meaningful steps to fix the leaks.



## The design of the proposed waterproofing for the rooftop parking of the Algo Mall narrowly met the requirements of the 1975 Ontario *Building Code*<sup>33</sup>

As early as August 1981, leaks were discovered along gridline 16, in front of the escalator, over the beam that ultimately collapsed. This leak was the first documented evidence at the Inquiry of a problem at this location, and continuing leaks there caused the corrosion of the weld that led to the collapse.<sup>34</sup>

NORR examined the building envelope design (the waterproofing) of the Algo Mall to determine if it complied with the 1975 Ontario *Building Code*. At that time the Code was not explicit in describing the type of waterproofing system which would be acceptable for an occupied building. It required only that roofing be installed to shed or drain water effectively. In NORR's opinion, that result was not achieved.<sup>35</sup> Mr. Hughes, the architect on the NORR team, testified that it was his responsibility to examine the condition of the concrete roof and the building envelope. While focusing on the specific location of the collapse and the rooftop parking deck, he had looked at three main components on the roof: the condition of the concrete, the various attempts to seal the cracks, and the condition of the drains and expansion joints installed there.<sup>36</sup>

The roof deck parking of the Mall had been designed as a flat roof. Mr. Hughes testified that flat roofs can be designed to have water sit on them, providing that the roof is waterproof. He noted that the roof of the Algo Mall was supposed to drain water as quickly as possible, but in fact that did not appear to have happened.<sup>37</sup>

Mr. Hughes reviewed the architectural drawings to determine if the design was compliant with the Ontario *Building Code* requirements. He noted that the details were not consistently shown throughout the drawings. There was no indication, for instance, of what the "waterproofing sealer" was to be. The requirement in the 1975 Code simply provided that "a roof should shed or drain water effectively." The first question therefore became whether the waterproofing sealer was actively shedding or draining water effectively. Mr. Hughes testified that, because the building was known to be leaking from the day it opened, it was fair to state that the waterproofing sealant had never functioned properly.

The second question was whether the architectural drawings complied with the *Building Code*. Mr. Hughes testified that, in the most narrow sense, he would have to say that the design did comply, but only inasmuch as the architect was relying entirely on the material – the waterproofing sealer – to act as a waterproofing membrane.<sup>38</sup> Mr. Hughes noted that the sealer did not shed water effectively, even though the design assumed that it would do so. Mr. Hughes concluded that the design narrowly met the expectations of the Code, but only in principle.<sup>39</sup>

Mr. Hughes explained that the decision on whether the architectural design was in compliance with the Ontario *Building Code* would have been made at the building permit review stage, when the drawings were submitted in order to obtain the building permit. After this stage, if the materials do not perform as anticipated by the design, the issue becomes one of warranty and maintenance.<sup>40</sup> NORR, and in particular Mr. Hughes, concluded that, notwithstanding the noted deficiencies or shortcomings in the design of the roof, the design could still be said to "narrowly meet the requirements of Part 4 of the OBC (1975) but relies entirely upon the 'WATERPROOFING SEALER' material."<sup>41</sup>

As early as August 1981, leaks were discovered along gridline 16, in front of the escalator, over the beam that ultimately collapsed. This leak was the first documented evidence at the Inquiry of a problem at this location, and continuing leaks there caused the corrosion of the weld that led to the collapse.

In the end, I am of the view that no plausible evidence was presented at the Inquiry leading me to conclude that the design and construction of the Algo Mall (excluding the application of the waterproofing system on the rooftop parking) was the direct cause of the collapse. Dr. Saffarini confirmed this same conclusion in his testimony when he indicated that NORR did not believe that the design had contributed to the actual collapse of the parking deck.<sup>42</sup>

It was abundantly clear from the evidence, however, that although the “design” of the waterproofing system met the requirement of the Ontario *Building Code* “in principle,” it never achieved the intended performance of the design. The application of the system enabled water and chlorides to leak into the interior space of the Mall. These leaks, which were allowed to continue unabated, caused the corrosion that led to the collapse.

## Corrosion at the Algo Mall

### **The Mall had extensive corrosion throughout and would have required retrofitting in order to remain operational**

The NORR team investigated the extent of corrosion at the Mall. Dr. Saffarini testified that the inspection of the steel was conducted over three days, when the team collected and tested samples of rust materials and corrosion product.<sup>43</sup>

One of the purposes of investigating the general state of the corrosion at the Mall was to determine whether the failed connection was an isolated instance. Was it only the failed connection that, for some combination of reasons, had suffered the level of corrosion observed, or was it a more widespread type of corrosion that was affecting the entire Mall or substantial parts of it?<sup>44</sup>

In order to obtain a fair representation of the state of corrosion at the Mall, NORR first did a visual inspection of the steel in 45 randomly selected locations, without the advantage of tools to actually scrape off the corrosion product. This process was designed to mimic someone doing a visual inspection without tools. In addition to this initial inspection, Dr. Ghods of Giatec inspected those same locations using a more detailed method to determine loss of section.<sup>45</sup>

During the Inquiry, the term “loss of section” was often used. NORR explained that this term describes what occurs when corrosion results in a reduction of the original steel material, which in turn leads to a decrease in the thickness of the material itself (be it the web, flange, bolt, weld, connection angle, or some other part). The reduction in the thickness of the material is deemed a loss of section that will affect the load-carrying capacity of the structure.<sup>46</sup>

As a point of reference, NORR opted to use the Ontario Structure Inspection Manual (OSIM), the standard used by the Ministry of Transportation, to evaluate the level of corrosion found in the Mall. Dr. Saffarini noted that, because there is no standard or guideline in Ontario for evaluating the level of corrosion in buildings and civil structures, they turned to this manual. Although the OSIM is generic and primarily intended for highway structures and bridges, it nevertheless provided a yardstick for classifying the corrosion observed at the Mall.<sup>47</sup>

Dr. Saffarini explained that the OSIM classifies corrosion into four conditions. For the purposes of the Algo Mall investigation, NORR grouped the classifications into three conditions:

- The first two, “excellent” and “good,” were classified as “good,” which included those areas which had surface rust only or were found to be completely unaffected.
- The second classification was “medium” or “fair,” which included conditions where some level of corrosion had progressed, and there was some section loss calculated at 10 percent or less.
- The third classification was “severe,” which included conditions where the corrosion had resulted in more than 10 percent of section loss. At more than 20 percent of section loss, NORR classified loss as “very severe,” but for the purposes of the Algo Mall inspection, “severe” and “very severe” were lumped together into one classification.<sup>48</sup>

Dr. Saffarini explained in his testimony that a condition noted as “fair” would mean that the inspecting engineer would have to raise an alarm and advise the owner to monitor the situation, but nothing would need to be done immediately to make repairs or reinforcement.<sup>49</sup>

In order to obtain the measurements of the loss of section, Dr. Ghods testified that he first cleaned the corroded steel down to shiny metal and used a digital caliper to measure the remaining section. The difference between the remaining section and the original size of the section being measured, which was obtained from the design specification, provided the basis for calculating the percentage of loss of section. Dr. Ghods explained that he conducted a detailed condition assessment of approximately 20 out of the 45 locations that had been selected for visual inspections.<sup>50</sup>

Dr. Ghods explained that, following the completion of his detailed assessment, he found that the top flange of the beams was generally in a worse condition than the bottom flange. This result was not surprising, given that the top flange had greater exposure to the leakage of chloride-contaminated water. He also found that the beams were slightly worse than the columns. The welds and other components of the connection in more than 40 percent of the locations inspected had severe to very severe corrosion. NORR deemed the general condition of the structure of the Mall to be poor. Corrosion was a widespread issue that affected significantly more than the connection that ultimately failed.<sup>51</sup>

NORR identified a number of other locations within the Mall which exhibited signs of very severe corrosion. The team considered them to be critical locations that cried out for immediate repairs to the structural members or connections.<sup>52</sup> NORR explained that signs of moderate to severe and very severe corrosion of the beams and connections were found in two locations selected at random: one of them showed no signs of leakage before the suspended ceiling tiles at gridline C-14 were removed; at the other, at gridline B-12, no indications or reports of problematic leakage had been received in the past.<sup>53</sup>

In areas such as the Dollarama Store at gridline C between gridlines 17 and 18, where there were obvious signs of previous water leakage, the inspectors noted severe corrosion of the beam as soon as the ceiling tiles were removed. In this location they found that the fireproofing had fallen off the underside of the bottom flange and a portion of the web, and they observed several layers of corrosion product and scaling on the beam. After they removed the corrosion product and measured this beam, they found that the remaining metal had an 18 percent loss of section in its flanges. An inspection of the connections of this beam revealed a similar level of corrosion in the steel angles and welds.<sup>54</sup>





**Figure 1.3.5 Severely corroded connection at the pedestrian walkway located at gridline E-13x**

Source Exhibit 3007

In addition to the interior of the Mall, the NORR team also inspected the pedestrian walkways located at the exterior perimeter. After removing the exterior cladding, the inspectors found some of the most severe corrosion there. In its report, NORR stated: “Beam flanges and stiffeners were reduced to almost nothing in some locations and more penetrations were uncovered through members.”<sup>55</sup> The team’s concerns were demonstrably and starkly illustrated by a significant number of photographs presented during the Inquiry showing the condition of the Mall. Any neutral observer of such egregious deterioration must be troubled by its logical implications. It speaks of glaring inattention, neglect, and lack of proper maintenance by the owners of the Mall during its lifetime (see figure 1.3.5).

NORR noted in its report that the team had no difficulty during its inspection at the Algo

Mall in finding signs of very severe corrosion. Team members observed corrosion in the majority of locations inspected, though the degree of corrosion varied from location to location. NORR determined that a number of critical areas would have required immediate attention.<sup>56</sup>

### **The rate of progression of corrosion at the Mall was similar to that found in the ballast tank of a ship**

Mr. Dinovitzer of BMT estimated that the corrosion of the structural steel in the Mall had progressed at a rate of 0.1 mm/year – a rate he said was similar to that found in a “marine environment” where moisture and chlorides are also present.<sup>57</sup> He testified that he used this term to try to convey the difference between a building-structure environment (which is typically dry, without the presence of chloride) and the Mall environment, which was humid and wet with moisture containing a lot of chloride. This type of environment would enhance or accelerate corrosion. When asked, he confirmed that he did not mean that the conditions were as though the Mall had been underwater in the ocean.<sup>58</sup>

In his testimony, Mr. Dinovitzer expanded on this comment and explained that the level of corrosion noted at the Algo Mall is uncommon in a building structure. He stated that it was difficult to find statistics on rates of corrosion for enclosed buildings, so he had turned to an industry that recorded such information – in particular, the Tanker Structure Cooperative Forum, an organization that conducts research related to ships and offshore structures. In looking at its data, Mr. Dinovitzer found that the estimated corrosion rates at the Algo Mall were similar to those observed in a ship’s ballast tank, where water and chlorine are present in quantity. He testified that the chemical analysis performed on the corrosion products had found that abundant chloride was present, presumably from the de-icing salts used on the roof and also dripping from cars. As previously noted, chloride had also been observed in the concrete as well. Mr. Dinovitzer said that leaking made the Mall a humid environment. If the Algo Mall had been a dry environment, as might be expected for a building, the corrosion rate found there would have been much less.<sup>59</sup>

In measuring the corrosion rate at the Mall, Mr. Dinovitzer assumed that the components were uniformly subjected to corrosion. No evidence was presented to dispute or discredit this assumption. During cross-examination, Mr. Dinovitzer acknowledged that there would have been events during the life of the Mall that would have accelerated or decreased the rate of corrosion. The NORR team, however, was not able to identify any specific moment or event that would have influenced the rate of corrosion. I accept the team's conclusion that it was reasonable, based on the information and data before it, to use the assumption that the rate of corrosion was uniform over the course of the years.

The assumption that the components were uniformly subjected to corrosion also took into account the evidence that, at the time of construction, the structural components were coated. Mr. Dinovitzer expected that this coating would have played a role in delaying the onset of corrosion, and he determined, based on factors enumerated in the BMT report, that, during the first five years of the life of the Algo Mall, the coating on the components did assist in resisting corrosion.<sup>60</sup>

### **On the day of the collapse, the weld of the failed connection was so depleted by the effects of corrosion that it could no longer support half its design load**

NORR stated that the constant wetting and drying, combined with the presence of chlorides, led to the corrosion of the steel framing and the failed connection. Over time, these conditions weakened the connection to a point where it could no longer support the weight of the parking deck, resulting in the failure of the welded connection. The end of the beam, along with the overlying hollow core slab of the parking deck level, then collapsed into the upper level of the Mall. The impact of the hollow core panels initiated a secondary collapse of a portion of the upper-level Mall framing.<sup>61</sup>

Although BMT assisted Giatec and NORR in estimating the rate of corrosion at the Mall, its main focus was the connection detail that was suspected of precipitating the collapse.<sup>62</sup> BMT was provided with the section of the column flange of the failed connection as well as with its beam and bolted angles. The separation of the connection occurred at the welds joining the two angles to the column flange (see figure 1.3.6).



**Figure 1.3.6a Column flange of failed connection**

Source Exhibit 3015



**Figure 1.3.6b Top view of the failed beam connection showing that the angle and bolted connection were severely corroded**

Source Exhibit 3015



NORR determined that the weld suffered a “two-stage” failure, likely separated by several months, but probably not by several years. Two elements were significant in determining how the collapse occurred: the presence of pitting and black oxide in the surface of the failed connection. This combination indicated that the initial failure had occurred along a portion of the weld some months before the final separation.<sup>63</sup>

The metal loss in the assembled weld connection suggested that a significant amount of material was lost because the corrosion process continued after the weld fracture. BMT noted in its report that the last piece of the connection to fail was the upper end (corner) of the angle section. The conclusion that the collapse occurred as a result of a two-stage failure was supported by several factors, including the evidence of rotation (or prying) of the remaining corner piece of the angle section from the column flange and the absence of corrosion pits on the failure surface of the corner of the angle section which had been pried away from the column flange.<sup>64</sup>

When members of the NORR team examined the angle of the failed connection, they noted that a small triangular piece of the angle had remained on the column face. By examining the material under a microscope, they were able to observe that the angle was pried off the flange, suggesting that the angle section fracture was the last element of the connection’s failure.<sup>65</sup>

Mr. Dinovitzer explained that, if one takes a piece of material and pulls on it in an effort to break it, the first thing to happen before it breaks is that the micro-structures of the material will deform. When he examined the material under a microscope, he was able to see that the steel grains were deformed. This “plastic deformation,” as it is known technically, indicated to him that the material had been stretched. He looked at the other failure surfaces next and noted that there were no signs of stretching. That difference suggested that the corrosion on these surfaces had consumed or absorbed the little bit of stretching that would have occurred at the fracture surface at the time of the initial failure. On this and other evidence, NORR determined that there had been a two-stage failure of the connection.<sup>66</sup>

BMT also carried out microscopic examination of the path of the fracture in an attempt to identify the mode of failure as well as the contributing factors. During the course of this examination, BMT was able to make the following observations:

- The failure of the surface on the column flange was entirely within the weld.
- Pits along the failure surface suggested that this surface had been exposed to a corrosive environment for a significant period of time; in addition, corrosion deposits were seen in the pits.
- The failure surface revealed no observable grain deformation, indicating that there had been no stretching or pulling of the metal and therefore no rotation or prying of the metal before the failure (other than the deformation referenced above).
- The failure surface of the welded connection on the beam did not display weld metal; that fact, together with the first point above, meant that the fracture path followed the weld fusion line – the border between the weld metal and the base material at the angle.<sup>67</sup>

On close examination of the failed connection, then, NORR determined that no weld metal had been left between the angle and the column flange. They were separated. The corrosion had progressed to a state where it had eaten away the entire weld. Corrosion had similarly caused a very significant amount of reduction in the weld in another location.



Mr. Dinovitzer testified that they could see that the angle was corroding from both sides, though the weld was corroding predominantly from one side. They also observed that the fracture (or failure) surface at the end of the angle had pitting, which meant that it had been exposed to the environment for a significant period of time.<sup>68</sup> BMT noted that the connection detail that failed had experienced a significant level of corrosion degradation, thereby reducing its load-carrying capacity.<sup>69</sup>

From NORR's perspective, the cause and mechanism of the collapse were evident. The connection of the beam to column G16, on gridline 16 between gridline Fx and G, failed in shear because of the loss of section of the weld. NORR specifically noted: "In fact the remaining weld after years of corrosion is so small that justification for the ability of the beam to support its own and the concrete above was subject of further testing and analysis." The condition of the column flange and the steel angles at the beam end as they existed at the time of the collapse is depicted in figure 1.3.7.

NORR determined that the force applied to the connection at the time of failure was approximately 50 percent of the design factor load. The team concluded that, on the day of the collapse, the welded connection was depleted to the extent that the car seen driving in the video footage over the area in the seconds before the collapse was the proverbial "straw that broke the camel's back." The connection could no longer carry any more weight, and the remaining weld sheared, leading to the immediate and sudden collapse. NORR determined that the portion of the weld which remained in place immediately before the collapse had only 13 percent of its original capacity.<sup>70</sup>

Dimitri Yakimov, an Algo Mall employee, had observed movement – rocking and clunking – of the precast panels in 2009 in the area of the ultimate collapse. I accept that evidence. I also accept NORR's findings that the observations made by Mr. Yakimov were likely not a sign that the first failure occurred in 2009, but rather that the two-stage failure identified by NORR was separated by a period of months, not years. Mr. Yakimov's evidence and the apparent lack of remedial action\* was further evidence of the failure by the owners and by the engineers retained by them to investigate properly the concerns brought to their attention during the life of the building.



**Figure 1.3.7** Face of the column flange at gridline G-16 and the beam and angle that were connected to the column flange before failure

Source Exhibit 3007

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\* Engineer Robert Wood of M.R. Wright and Associates testified that, although he was taken to the area by Mr. Yakimov, he observed no such rocking or clunking sounds as cars passed over the area. Even if he had witnessed such an occurrence, he stated, it would not have been unusual: Wood testimony, June 6, 2013, pp. 13327–8.

## The actions of the owners contributed to the collapse

### The attempts to repair the leaks never worked

The parking deck was constructed with a 3-inch concrete topping above the precast hollow core panels. Over the years, this deck was described as having several visible cracks that corresponded to joint locations between the precast panels immediately below the topping. It is clear, as I explain below, that salt-laden water entered the interior space of the Mall through the parking deck. The witnesses were consistent in their evidence that, throughout the life of the Mall, the favoured method of repair was to apply sealant to the cracks in an attempt to stop the entry of water into the retail space below. The NORR team members confirmed that they saw evidence of this practice. Following their review of photographs as well as the history of reports and correspondence, they concluded that the crack-sealant methods used by the various owners over the years did not prevent the infiltration of water through the parking deck.<sup>71</sup>

No evidence was provided to the Commission to show that the practice of sealing cracks was an effective means of stopping the leaks. At best, it stopped some leaks for a finite (usually short) period. The witnesses testifying on behalf of the Mall's second owner, Retirement Living, and its counsel, through re-examination and cross-examination, attempted to convince the Commission that its methods of sealing were more effective at stopping the leaks than those used by the first owner, Algocen, and the third owner, Eastwood Mall Inc. However, ample evidence was presented to the contrary. The documentary and oral evidence presented satisfies me that the Mall continued to leak unabated during Retirement Living's ownership, supporting the conclusion reached by NORR that the crack-sealant methods employed by *all* the owners over the years were inadequate to prevent water infiltration through the parking deck. I accept NORR's conclusion on this issue.

### Retirement Living could have saved the Mall by installing a membrane

Dr. Saffarini stated that, on the basis of the information obtained by NORR, if Retirement Living had installed a membrane and asphalt wearing course on the rooftop parking deck when it purchased the Algo Mall, the leaks would have stopped. He was also comfortable in expressing the opinion that, despite a degree of uncertainty relating to the condition of the Mall at the time of purchase, if the leaks and the resulting corrosion had been stopped in 1999, the structure likely would have endured without any strengthening being required.<sup>72</sup> I accept this conclusion.

### Eastwood Mall would have had to do more: Install a membrane *and* strengthen the steel

Dr. Saffarini testified that the building would have reached a point (before the collapse) where, even with the application of a waterproof membrane and asphalt wearing course, some retrofitting / strengthening of the structure would have been required. He could not point to an exact time when this threshold would have been reached; however, he postulated that the threshold had been attained sometime in the early 2000s. Based on his evidence, it would appear that, even if a waterproof membrane and asphalt wearing course had been applied on the rooftop parking of the Algo Mall in the early 2000s, the owner – NorDev or Eastwood Mall – would have also been required to undertake some retrofitting / strengthening of the structure in order to address the depleted capacity.<sup>73</sup>

## **No other plausible theories were presented to explain the cause of the collapse**

Mr. Wood, the last engineer to inspect the Mall before its collapse, explored alternative theories to explain the cause of the collapse. Although these alternative theories were suggested through cross-examination by his counsel, no requests were made on his behalf for leave to enter additional expert reports in support of his positions. Some of these theories were put to the NORR Panel during its testimony.

Dr. Saffarini testified that the NORR team sought to determine if there were other possible causes or contributing factors to the collapse and the failure of the beam:

We considered or we reflected on any possibilities – as we have said, in terms of looking at the design and any contributing factors. The fact that in this particular case, as I have said yesterday, it was very evident that the connection was completely deteriorated, that the capacity that remained in the connection was so low – it was not very difficult to correlate the cause of the collapse with that diminishing strength of that connection, pointed us in this direction, but we nevertheless explored the strength and design capacity and so on, of all of the members.<sup>74</sup>

## **The column did not buckle before the collapse**

Counsel for Mr. Wood pointed out that, in one of the photographs presented by NORR, the column to which the collapsed beam had been attached appeared to be buckled. Dr. Saffarini explained that what was seen in the photograph was not evidence that the column had buckled. Rather, during the demolition that followed the collapse, the column had been bent as it was torn out of the building.<sup>75</sup>

## **The “clunking” noticed by Mr. Yakimov was not a result of an early partial failure of the connection**

During its investigation, NORR looked at whether the reports by Mr. Yakimov in 2009 of the rooftop panels rocking as cars passed over the area of the eventual collapse could have been an indication of a partial collapse at that time. It found that a number of reasons could explain the movement and clunking noises observed by Mr. Yakimov and ultimately concluded that an early partial failure of the connection from the corrosion was the least likely explanation for the phenomenon.

It was more likely that the noise and movement was a result of an uneven bearing of the precast panels, caused by the deterioration of the Masonite bearing pads placed between the panels and the steel beams at the time of construction. These bearing pads are used to ensure that the hollow core slabs are sitting properly on the beam, with no gaps between the bottom of the slab and the top flange of the steel beam. The entry of water through the rooftop parking would have deteriorated the Masonite (a hardboard that is not waterproof), resulting in the hollow core slabs not sitting evenly on the beams. This irregularity would have led to the movement and noise observed by Mr. Yakimov.<sup>76</sup>



## The collapse at the Algo Centre Mall was not a progressive collapse

Counsel for Mr. Wood, through cross-examination of a number of witnesses, suggested that the collapse was a “progressive collapse” – a result of the hollow core slab not having been properly restrained at the time of construction. He explored this theory during the evidence given by the NORR Panel. Dr. Saffarini, answering on behalf of the panel, dismissed this theory in its entirety:

I think the collapse that did occur was not a progressive collapse, in the sense that it did not expand beyond the failure of the connection. And the failure below is a direct impact of the failing panels onto the upper mall panels and directly failing them. A progressive collapse would be where there is a loss of – say, a column that led to a loss of a group of members, which eventually led to a wave of loss of adjacent columns and more members, where the entire structural or substantial part of the structure would have failed. But in this particular case, this is localized – and the only progress in it is the actual impact of the dropped panels into the upper mall.<sup>77</sup>

## The freeze–thaw cycles experienced at the Algo Mall did not cause the collapse

Dr. Saffarini testified that he disagreed with the suggestion made during cross-examination by counsel for Mr. Wood that the freeze–thaw cycle or the variation in temperatures had any role in the deterioration of the hollow core slabs. He explained that the cycle of temperature changes would have an effect on the stresses and forces in the structure (both the steel and the concrete), but that this cycle was not something that the NORR team considered to be key or of significance in the collapse.<sup>78</sup>

Dr. Saffarini disagreed with the further proposition suggested in cross-examination by Mr. Wood’s counsel that the change in the design, which saw the placement of the insulation underneath the hollow core slabs as opposed to on top, contributed to the collapse. Counsel for Mr. Wood suggested that this change placed the slabs outside the building envelope and caused or contributed to the collapse by putting the structural steel below the slabs under stress at various times during the course of the year. However, Dr. Saffarini testified that the impact of temperature on the precast slabs and on the steel was not significant in terms of determining the cause of the collapse.<sup>79</sup>

## Conclusions

A section of the Algo Mall collapsed as a result of a failed connection. The connection at gridline G-16 did not fail because of a construction defect. It failed because of exposure over the years to constant wetting and drying conditions in the presence of chlorides, which leaked from the rooftop parking deck unabated for more than 30 years. I am content with the findings made by NORR: I agree that the collapse occurred because the weld connecting the angle to the column had become so depleted from corrosion that it was no longer able to hold even half its designed load.

The design of the roof deck parking was permitted by, and met the requirements of, the 1975 Ontario *Building Code*. NORR's evidence was to that effect: individually, the various design elements that made up the structure of the Algo Mall – specifically, the structural steel, the hollow core slabs, and the waterproofing system – all met those requirements.

However, the waterproofing system was never able to provide a watertight roof to the Mall. Clearly, the roof was far from ideal, considering the climatic conditions in Elliot Lake. It was also costly and difficult to repair and maintain. This factor operated as a powerful disincentive to the owners to take any meaningful steps to remedy the constantly leaking roof.

Those design inadequacies (including, in particular, the lack of a waterproof membrane as part of the original design or as a later addition), and an unwillingness to address leakage in a meaningful way, led inevitably to the exceptional corrosion that precipitated the collapse.

The evidence before this Commission is clear that the waterproofing of the roof failed virtually from the outset. The logical course of action would have been to undertake early and effective remedial measures to protect a valuable asset. Successive owners neglected to do so, and the consequences of that neglect were tragic.

The evidence presented to the Commission showed that the materials that made up the waterproofing system failed very early on, if not immediately. When the first owner, Algocen, saw that the system was not meeting the design intent, it could have taken the next logical step of replacing the entire waterproofing system in order to stop the leaks and protect its asset. None of the owners of the Mall took any real steps to stop the leaks, as the cost to do so would have jeopardized their bottom line.

**A section of the Algo Mall collapsed as a result of a failed connection. The connection at gridline G-16 did not fail because of a construction defect. It failed because of exposure over the years to constant wetting and drying conditions in the presence of chlorides, which leaked from the rooftop parking deck unabated for more than 30 years.**

## Notes

- <sup>1</sup> Exhibit 3007, p. 278.
- <sup>2</sup> Exhibit 5157.
- <sup>3</sup> Exhibit 5156.
- <sup>4</sup> Exhibit 5155.
- <sup>5</sup> Exhibit 5154.
- <sup>6</sup> On May 29 and 30, 2013, Dr. Hassan Saffarini and Christopher Hughes of NORR, together with Dr. Pouria Ghods from Giatec and Aaron Dinovitzer of BMT, testified as a panel of experts before the Commission.
- <sup>7</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12187–8.
- <sup>8</sup> Exhibit 3141.
- <sup>9</sup> Exhibit 3007, p. 333.
- <sup>10</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12188.
- <sup>11</sup> O Reg 925/75.
- <sup>12</sup> Exhibit 3007, p. 279.
- <sup>13</sup> Exhibit 3007, pp. 348–52.
- <sup>14</sup> Exhibit 3007, p. 356.
- <sup>15</sup> Exhibit 3007, p. 358.
- <sup>16</sup> Exhibit 3007, p. 281.
- <sup>17</sup> Exhibit 3007, p. 363.
- <sup>18</sup> Exhibit 3007, p. 362.
- <sup>19</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12249–50.
- <sup>20</sup> Exhibit 3007, p. 363.
- <sup>21</sup> Exhibit 3011, p. 705.
- <sup>22</sup> Exhibit 3007, p. 363.
- <sup>23</sup> Exhibit 3015.
- <sup>24</sup> Exhibit 3015, p. 174.
- <sup>25</sup> Exhibit 3007, p. 363; Exhibit 3015, pp. 173–80; NORR Panel testimony (Dinovitzer), May 29, 2013, pp. 12295–6.
- <sup>26</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12250–1.
- <sup>27</sup> Exhibit 3007, p. 411.
- <sup>28</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12252–3.
- <sup>29</sup> Exhibit 3007, p. 279.
- <sup>30</sup> NORR Panel testimony (Ghods), May 29, 2013, p. 12313.
- <sup>31</sup> NORR Panel testimony (Ghods), May 29, 2013, pp. 12313–14.
- <sup>32</sup> Exhibit 3007, p. 325.
- <sup>33</sup> O Reg 925/75.
- <sup>34</sup> Exhibit 3007, p. 300; Exhibit 541.
- <sup>35</sup> Exhibit 3007, pp. 281–2.
- <sup>36</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12214.
- <sup>37</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12227–9.
- <sup>38</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12236–42.
- <sup>39</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12243.
- <sup>40</sup> NORR Panel testimony (Hughes), May 30, 2013, p. 12517.
- <sup>41</sup> Exhibit 3007, p. 352.
- <sup>42</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12247.
- <sup>43</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12232, 12234.
- <sup>44</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12258–9.
- <sup>45</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12260.
- <sup>46</sup> Exhibit 3007, pp. 391–2.
- <sup>47</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12261.
- <sup>48</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12262–6.
- <sup>49</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12264.
- <sup>50</sup> NORR Panel testimony (Ghods), May 29, 2013, pp. 12273–4.
- <sup>51</sup> NORR Panel testimony (Ghods), May 29, 2013, pp. 12280–1; Exhibit 3007, pp. 389–91.
- <sup>52</sup> Exhibit 3007, p. 392.
- <sup>53</sup> Exhibit 3007, p. 393.
- <sup>54</sup> Exhibit 3007, pp. 395–6.
- <sup>55</sup> Exhibit 3007, p. 401.
- <sup>56</sup> Exhibit 3007, p. 404.
- <sup>57</sup> Exhibit 3007, p. 280.
- <sup>58</sup> NORR Panel testimony (Dinovitzer), May 30, 2013, pp. 12669–79.
- <sup>59</sup> NORR Panel testimony (Dinovitzer), May 29, 2013, pp. 12304–6.
- <sup>60</sup> Exhibit 3015, p. 195.
- <sup>61</sup> Exhibit 3007, p. 336.
- <sup>62</sup> Exhibit 3015, p. 152.
- <sup>63</sup> Exhibit 3015, p. 198.
- <sup>64</sup> Exhibit 3015, p. 198.
- <sup>65</sup> Exhibit 3015, Appendix H, p. 187.
- <sup>66</sup> NORR Panel testimony (Dinovitzer), May 29, 2013, pp. 12308–10.
- <sup>67</sup> Exhibit 3015, p. 180–1.
- <sup>68</sup> NORR Panel testimony (Dinovitzer), May 29, 2013, pp. 12300–1; Exhibit 3015, p. 180.
- <sup>69</sup> Exhibit 3015, p. 198.
- <sup>70</sup> Exhibit 3007, p. 406–7.
- <sup>71</sup> Exhibit 3007, p. 334.
- <sup>72</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12570–2.
- <sup>73</sup> NORR Panel testimony (Saffarini), May 30, 2013, p. 12573.
- <sup>74</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12547–8.
- <sup>75</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12541–4; Exhibit 3015, figure 2.1, p. 11.
- <sup>76</sup> Exhibit 3007, pp. 408–10.
- <sup>77</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12539–40.
- <sup>78</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12519–20.
- <sup>79</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12528–9, 12537–8.



SECTION

# III

.....

The Algocen Years  
1979–99

*Designed in an L shape, the Algo Centre was constructed on a large, rocky slope with higher elevation toward the west, sloping down to the east. Because of this slope, the Mall had three levels: an upper level (second floor) with rooftop parking above it; a lower level (first floor) for most of the Mall; and a basement level at the east end of the Mall, farthest from the slope. The Mall's roof was designed and used as an unsheltered parking lot. Its structure was designed and constructed with steel beams and columns and pre-stressed, precast hollow core concrete slabs that rested on the beams and served as the floor and roof of the parking deck.*

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## Construction of the Algo Centre Mall

### Algocen Realty Holdings Ltd. – the owner and developer

Algocen Realty Holdings Ltd. was the first of three owners of the Algo Centre, which included the Algo Mall and the Algo Inn Hotel, at 151 Ontario Street in Elliot Lake. The building was constructed in 1979–80 and continued to operate as a mall and hotel until the partial roof collapse on June 23, 2012.

At the time of the construction of the Algo Centre, Nicholas Hirt was the vice-president of Algoma Realty Holdings Ltd. (then Algoma Central Properties Inc.). There was no president. Algocen Realty operated under the holding company Algoma Central Railway, which subsequently became Algoma Central Corporation, and was headed by a chief executive officer.<sup>1</sup> In 1989, Algocen Realty Holdings changed its name to Algoma Central Properties Inc.<sup>2</sup> Algoma Central Properties Inc. was the owner of the Algo Centre until 1999, when it was sold to 1309900 Ontario Ltd. operating as NorDev.<sup>3</sup> For the reader's convenience, I will refer to both Algocen Realty Holdings Ltd. and Algoma Central Properties Inc. simply as Algocen.

Algocen already owned the Station Mall in Sault Ste. Marie, Ontario, built in 1973, and at about the time of construction of the Algo Mall had a real estate portfolio that also consisted of other properties, including the Station Tower (office building), a Holiday Inn, and a residential high-rise apartment building, all in Sault Ste. Marie.<sup>4</sup>

On March 6, 1979, Algocen entered into an agreement with the Corporation of the Town of Elliot Lake. The terms of that agreement anticipated that Algocen would acquire certain land on which it would develop a commercial complex containing a shopping centre of not less than 165,000 square feet of gross leasable retail floor area, a general office building consisting of not less than 12,500 square feet of leasable office space, and a hotel containing no fewer than 80 bedrooms.<sup>5</sup>

On March 14, 1979, Algocen purchased the land where the Algo Centre would be constructed from the Town of Elliot Lake for \$118,700.<sup>6</sup>

### General design of the Algo Centre Mall and Hotel

Designed in an L shape, the Algo Centre was constructed on a large, rocky slope with higher elevation toward the west, sloping down to the east. Because of this slope, the Mall had three levels: an upper level (second floor) with rooftop parking above it; a lower level (first floor) for most of the Mall; and a basement level at the east end of the Mall, farthest from the slope. Embedded in the north end of the Mall was the six-storey Algo Inn Hotel, with four floors of the hotel rising above the Mall. The Hotel had a mechanical room on top of it.<sup>7</sup> The Mall's roof was designed and used as an unsheltered parking lot. Its structure was designed and constructed with steel beams and columns and pre-stressed, precast hollow core concrete slabs that rested on the beams and served as the floor and roof of the parking deck (see figures 1.4.1 and 1.4.2.)<sup>8</sup>

### The Mall was constructed using steel framing

The structural steel for the Algo Centre was supplied and installed by York Steel Construction Ltd. (York). York was also responsible for providing the shop drawings and design of the connections of the steel beams to the columns. A professional engineer stamped the connection design drawings.<sup>9</sup>

The steel structure for the building as a whole had an approximate 2-inch slope built into it to assist with the drainage on the roof.<sup>10</sup>



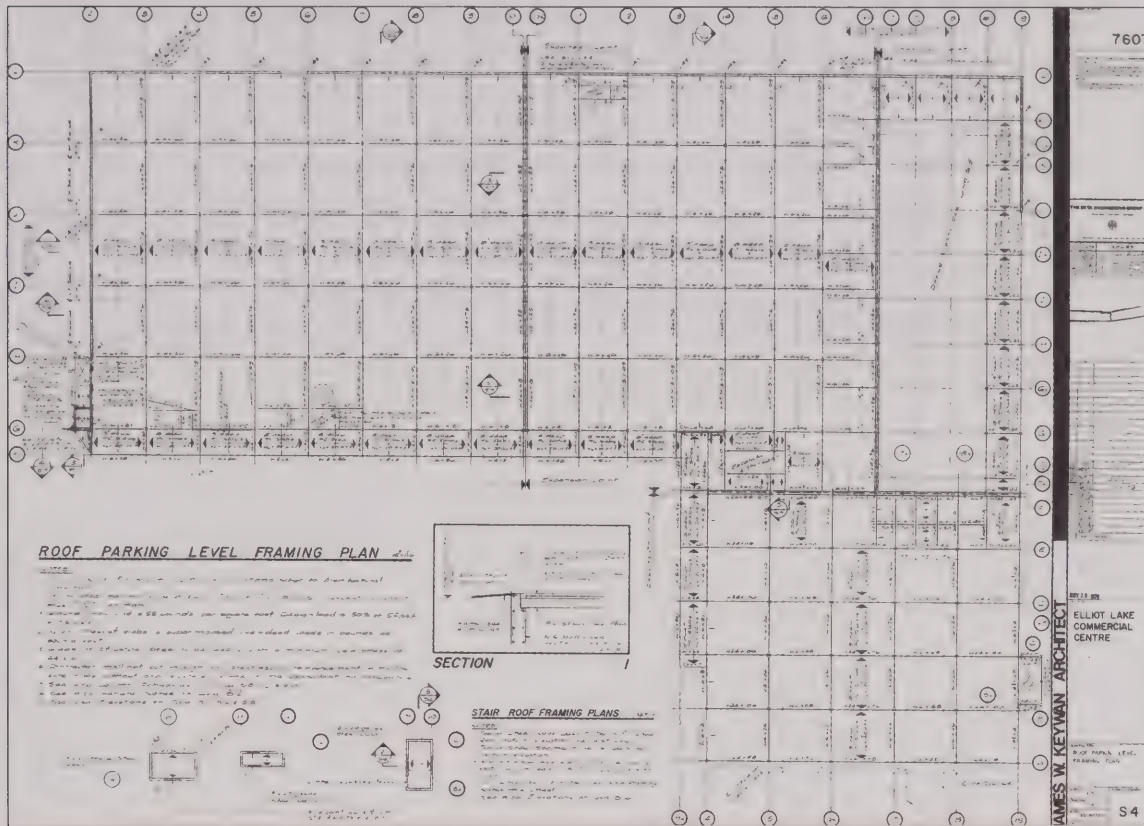


Figure 1.4.1 The engineer's original structural drawing for the Algo Mall roof

Source Exhibit 181

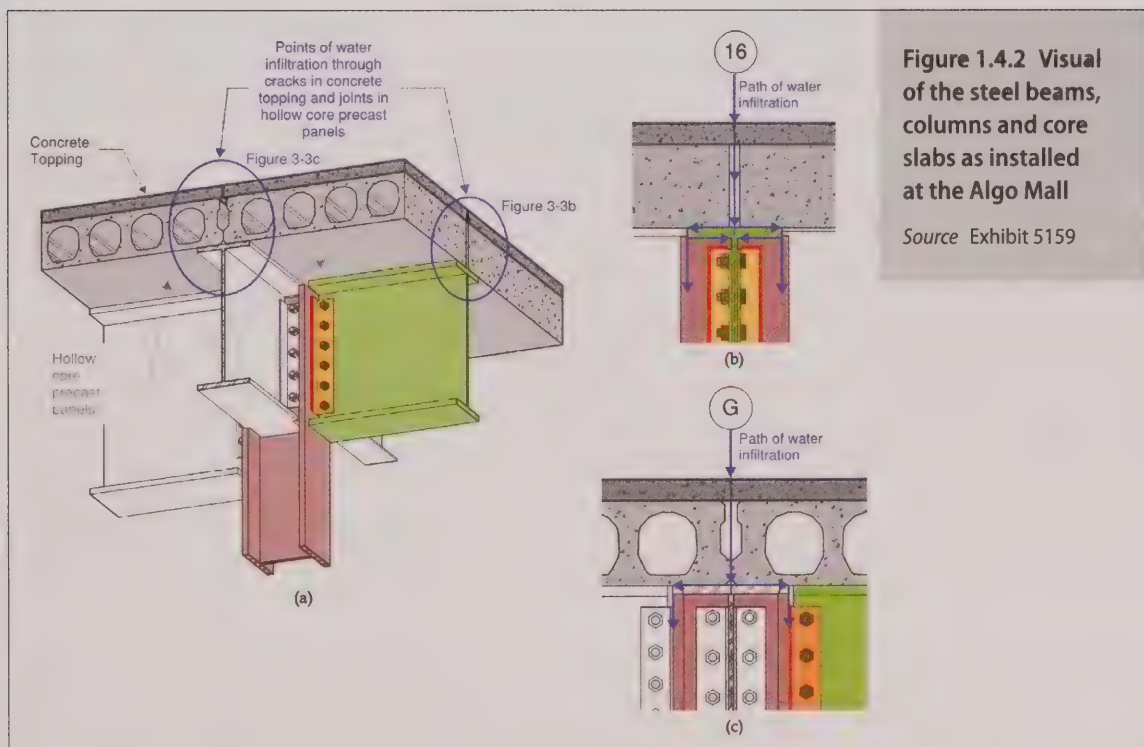


Figure 1.4.2 Visual of the steel beams, columns and core slabs as installed at the Algo Mall

Source Exhibit 5159

The steel supplier is responsible for completing and carrying out the design. The structural engineer examines the shop drawings prepared by the steel supplier. According to project engineer John Kadlec, however, this examination is simply a review and not a full verification, because the drawings would already have been stamped by the professional engineer employed by the supplier.<sup>11</sup> These shop drawings would show every steel member in the structure, the number of bolts, the sizes of the bolts, the welding, and more.<sup>12</sup>

The structural steel-erection process is subject to inspection throughout construction. It includes inspecting the connections (according to Mr. Kadlec, during construction every connection should be inspected), torque-testing the bolts, inspecting the condition of beams and columns, and ensuring that there are no unauthorized splices. The inspection of the steel also seeks to ensure that the columns are plumb, meaning that they are vertically straight and not slanted. In the case of the Algo Centre, these inspections were carried out by the Trow Group Limited (Trow).<sup>13</sup>

Although not ultimately relevant to the cause of the collapse at the Algo Mall, a serious problem arose during construction with respect to the structural steel system being out of plumb. According to the Report on Anchor System Installation prepared for Algocen on January 22, 1980, “out of plumb” columns were first observed at the site in August 1979. York proposed a system for anchoring the building to bring it back to plumb, and Franklin Trow Associates Ltd. supervised that installation.<sup>14</sup>

Evidence before the Commission indicates that this anchoring system was still being installed in mid- to late November 1979. The anchor system was tensioned in mid-January 1980.<sup>15</sup> A representative from Trow was “present on the 18th of January 1980 to ensure that no movement in the structure resulted from the tensioning of the horizontal anchors.” No movement was detected.<sup>16</sup>

NORR assessed the capacity of the steel beam at the location of the collapse and determined that it was slightly deficient but concluded that the deficiency had no bearing on the final collapse. The sufficiency of the steel beams and connections is explored in greater detail earlier in this Report. I agree with NORR’s conclusions and find that it is likely that the capacity of the steel as designed and installed did not play a role in the cause of the collapse.\*

### **Hollow core slabs – a cheaper and lighter material for the floor and roof deck, but one susceptible to leaks and to damage from leaks**

Before I discuss the evidence of the architect, the engineer, and those involved in the installation of the waterproofing system at the Algo Centre, it is necessary to discuss in some detail the nature and use of hollow core slabs as part of the structural and roofing systems.

What follows is a general description of the hollow core slabs supplied by Coreslab Inc. (Coreslab) for the Algo Centre, along with some initial evidence of how these slabs were manufactured and installed. In addition, this section sets out the evidence of certain witnesses called by the Commission to comment on the ability of those slabs to bear the load they were designed to carry and/or to take on additional load, if necessary.

.....

\* See, for example, NORR Panel testimony (Saffarini), May 29, 2013, p. 12253, where Dr. Saffarini indicates that the anchoring of the steel frame was not relevant to the collapse. NORR concluded elsewhere in its report that the strength of the steel and the weld at the point of collapse were more than sufficient to take the specified and actual loads. See, also, Aaron Dinovitzer’s (NORR’s) assessment of the tensile strength and chemistry of the steel: “The materials that were used were in agreement with the standards of the day” and the welds – similar connections to the one that failed – “looked quite fine.” NORR Panel testimony (Dinovitzer), May 29, 2013, p. 12296.



The hollow core slabs that sat on top of the steel framing were 8 inches deep and 4 feet wide and had hollow cores to minimize weight. Their length depended on the area they spanned, but typically were 30 to 31 feet long in the Mall area. The hollow core slabs formed the floors of the interior of the Mall and the roof and parking deck.<sup>17</sup>

### Common uses and general description of hollow core slabs

At the time of construction of the Algo Mall, Coreslab Inc., established in 1975, was one of several companies in Ontario manufacturing hollow core slabs.<sup>18</sup> In order to manufacture the hollow core precast slabs, concrete is poured into a steel form bed in which, before the pour, half-inch steel cables, called pre-stressing strands, are set in place and pulled taut so as to put them under tension. As illustrated in figure 1.4.3, the concrete consolidates through the form and around the strands, and comes out as a hollow core slab.<sup>19</sup>

The pre-stressing strands provide what is called tensile strength (i.e., reinforcement) within the hollow core slab.<sup>20</sup> The number of strands running through the slab, which can vary, determines the capacity of the slab. The longer the slab and the heavier the load, the more strand reinforcing is required in the product.<sup>21</sup> The concrete used is “zero slump,” meaning that it is a very dry, solid, and dense concrete mix that holds its form once produced.<sup>22</sup>

Coreslab can manufacture slabs that are 8, 10, and 14 inches in depth. All slabs manufactured by Coreslab have a standard width of 4 feet. The slabs produced at the plant are 500 feet in length and, after approximately eight hours curing time, are custom cut to the lengths required by the shop drawings for the project.<sup>23</sup> The Algo Mall design typically called for 30- to 31-foot-long, 8-inch-thick slabs. Eight-inch slabs typically have between three and seven strands in the bottom, although up to two strands can also be located on the top side of the slab for a cantilevered situation (anchored at only one end). Depending on the thickness of the slab, the number of strands can therefore vary from three to 11.<sup>24</sup> Once cut to the length specified in the design, the slabs continue to cure for 28 days. When cut, the pre-stressing strands do not protrude on either end but are flush to the ends of the slabs.<sup>25</sup>



**Figure 1.4.3** The manufacturing process for the hollow core slabs

Source Exhibits 1928, 1929



Very little has changed in the manufacturing and installation of hollow core slabs from 1979-80 to the present day.<sup>26</sup> Hollow core slabs are used for many things, including residential projects, schools, flooring, and roofing. They continue to be used for roof decks that also serve as parking; this purpose, however, represents a small portion of Coreslab's market share.<sup>27</sup> Coreslab's current chief engineer, Sonia Saari, testified before the Commission that hollow core slabs are appropriate for use in parking garages so long as the assembly is constructed with waterproofing in mind.<sup>28</sup> She later indicated, though, that it was "[n]ot terribly common" for Coreslab product to be used for rooftop parking decks in areas with inclement weather, such as Elliot Lake typically experiences, and that she had no knowledge of any similar projects where rooftop parking and hollow core slabs were combined. She could also not recall any situation where hollow core slab has been used for rooftop parking with retail space directly below, in any weather condition.<sup>29</sup>

One of the advantages of precast hollow core slabs is their lighter weight. Although the standard weight of concrete is 150 pounds per square foot (psf), an 8-inch hollow core slab (today and in approximate terms also at the time of construction) has an approximate weight of 62 psf.<sup>30</sup>

### **Coreslab's engineers are involved in the preparation of drawings, the inspection of pre-cast work, and the overseeing of installation**

Two companies bid to supply the hollow core precast slabs for the Algo Centre. On March 21, 1979, Coreslab quoted a price of \$842,735 to supply and erect approximately 289,438 square feet of 8-inch "Dy-Core Floor and/or Roof Slabs." It was the successful bidder and was awarded the contract.<sup>31</sup>

David Hellyer, an engineer with Coreslab at the time, designed, signed, and stamped the shop drawings for the installation of the hollow core slabs at the Algo Centre.<sup>32</sup> Coreslab still employs in-house engineers with a specialty in structural engineering.<sup>33</sup> In addition to preparing the drawings, the Coreslab engineer inspects the pre-cast work, and is also involved in overseeing the installation operation.<sup>34</sup> Mr. Hellyer would have fulfilled these duties in 1979.

Before the manufacture of the hollow core slabs, Coreslab receives from the structural engineer responsible for the project (not the Coreslab engineer) the contract documents, structural drawings, and specifications. If there are particular structural requirements for a slab, it is the responsibility of the engineer of record to bring them to the attention of the manufacturer.<sup>35</sup>

Shop drawings based on the engineer of record's original structural drawings are then produced by the Coreslab engineers<sup>36</sup> and reviewed by the structural engineer and the architect. The architect typically looks at dimension to ensure the materials will fit within the design, while the engineer looks at steel size, connections, loading, and related matters.<sup>37</sup>

The evidence before the Commission could not establish with certainty whether Mr. Hellyer visited the site during construction of the Algo Centre in 1979. According to Coreslab, the firm's engineers now make regular site visits to ensure general conformance and quality of installation.<sup>38</sup> Based on current practices, it is assumed Mr. Hellyer likely visited the site during the installation.

### Installation, grouting, and tie rods

The slabs are manufactured at the Coreslab plant in Dundas, Ontario, and shipped to the construction site. At the site, slabs such as the one shown in figure 1.4.4 are set in place with a crane and placed alongside all the other slabs.

When two slabs are placed side by side, they are constructed so that the bottom parts of the slabs abut, but the top side opens up like a “V” and is filled with grout to form what is called the grout key.<sup>39</sup> At the Algo Centre project, the spacing at the butt ends of the slabs was not grouted but left open to allow for expansion, contraction, and cambering (the tendency of the slab to arch slightly as a result of the tension in the embedded cable).

The shop drawings are consulted during construction to determine the type of connection required in a particular location. For example, where the slabs are installed on a masonry frame, reinforcing bars are used to anchor the core slabs in place. This type of anchoring might be seen where the design calls for welded connections to the underlying steel beams. The slabs are usually fastened in some way to the framing beneath them, but occasionally they just sit directly on top of the frame and are not physically connected.<sup>40</sup> The typical purpose of connecting the slabs relates to load transfer and dispersion, as explained by Doug Harman, a Coreslab representative, who testified:

It is designed as part of the integral system of the entire structure. So a detail like this would, in an example such as this, if it was going down would transfer loads from the foundation wall, so loads pushing on the foundation wall transferring it into the slab. So it is an integral part of the design to transfer loads.<sup>41</sup>

Mr. Harman added that the welding of the steel reinforcing bars is done only “minimally for failure, in other words, the primary purpose of the anchoring is not to create a redundancy for structural capacity in the event of failure of another element, but rather for the transfer and dispersal of loads.”<sup>42</sup> The grout between the slabs is designed to transfer loads between slabs, so that the slabs act together as one, transferring load from one slab to the other, and avoiding a “piano key effect” that could otherwise arise where the slabs act individually.<sup>43</sup>

### Hollow core slabs are a structural element and are not part of the waterproofing

Hollow core slabs are a structural element and are not meant to form part of the waterproofing system. Coreslab does not recommend that the slabs be left exposed outside the building envelope. The product is not designed to go through the freeze–thaw cycle or to act as a waterproofing component.<sup>44</sup>



**Figure 1.4.4 A crane places hollow core slabs on a project**

Source Exhibit 1933

To protect it from damage caused by the freeze–thaw cycle, standard concrete for use in a poured-in-place foundation usually has air added (air-entrained mix) to the concrete in the batching process (the mixing of materials). The air creates voids in the concrete that allows penetrating water to expand and contract within those voids. The process involved in producing hollow core slabs takes almost all the air out of the concrete. But this process removes a key defence mechanism against temperature changes that other types of concrete typically possess.<sup>45</sup>

### **Salt (chloride) corrodes concrete and embedded steel strands**

Exposure to chlorides from salt used to melt snow<sup>46</sup> is corrosive to all concrete (air-entrained or not), including concrete used for the production of hollow core slabs.<sup>47</sup> It is imperative that the strands within the hollow core slabs not be corroded. The strands embedded in the slabs provide the additional load-carrying capacity. If those strands are exposed to conditions causing corrosion, such as salt and moisture, they can begin to lose their section (reduction of the original steel material) and their strength.<sup>48</sup>

Ms. Saari explained that where pre-cast slabs have too much chloride in them, the salts pass through the concrete and lower the pH level of the concrete.<sup>49</sup> She explained that concrete is highly alkaline in its normal state, and in an alkaline environment the strands or reinforcing steel bars do not corrode.<sup>50</sup> However, when chlorides get in and change the pH level of the concrete, the passive layer of carbonation around the steel is destroyed, and the steel begins to corrode. The corroded (or rusted) steel has a greater volume than non-corroded steel and will begin to expand and exert pressure on the surrounding concrete, causing it to spall (break apart). Spalling can result in chunks of concrete falling off from around the steel strands, as shown in the photographs taken by Elaine Quinte, owner of Hungry Jack's, a tenant in the Mall and Joe Hammond, maintenance worker at the Mall (see figure 1.12.1, in Chapter 12).<sup>51</sup>

### **The expansion joints and butt joints – other places for leaks to occur**

Three expansion joints were included in the design, dividing the building into four parts. At the location of the expansion joints, the steel and concrete were separated from the top down through the bottom of the structure, creating separate structural entities. Because of temperature changes, the expansion joints were necessary to allow room for expansion and contraction throughout the building,\* allowing each section to move independently.

The expansion joints at the Algo Mall were located as follows:

- The first was in the south portion, at the northern edge of the space initially occupied by Woolco (later, Zellers) and just south of the space occupied by the Bank of Nova Scotia, spanning the whole of the building east to west.
- The second spanned the building north to south and was located in the area of the roof near the entrances to the Mall and the Hotel.
- The third spanned east to west and was immediately adjacent to the south wall of the Hotel.<sup>52</sup>

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\* Thermal movement can be described as the tendency of matter to change in volume in response to a change in temperature. The degree of movement divided by the change in temperature is called the material's coefficient of thermal expansion and generally varies with temperature. If an equation of state is available, it can be used to predict the values of the thermal movement at all the required temperatures and pressures.



The two expansion joints located in the northern section of the building intersected at the southeast corner of the Hotel. Many witnesses who testified before the Inquiry reported that the expansion joints were a source of significant leaks in the Mall.

In addition to the three expansion joints, a space was left at the ends of each hollow core slab (i.e., the ends that are 4 feet in width) to allow expansion and contraction of the slabs. This space, or joint, was often referred to by witnesses before the Commission as an “expansion joint.” However, it is not to be confused with the major expansion joints described above. To avoid confusion, I will refer to the spacing at the ends of the core slabs as butt joints or end joints.<sup>53</sup>

### **The concrete topping added strength to the structure; it also affected drainage**

A concrete “topping” or “wearing course” was poured on top of the hollow core slabs in the parking area of the Mall.<sup>54</sup> It was cast directly onto the surface of the hollow core slabs and was to act “compositely” – as a unified connected whole – with those panels. The effect of the added concrete topping was to increase the capacity of the slabs, provided that the bond between the two materials (the slabs and the topping) was capable of sustaining load transfer.<sup>55</sup> This notion of bonding and composite action will be discussed in greater detail below.

The general thickness of the concrete topping was 3 to 4 inches,<sup>56</sup> but its depth varied across the roof of the parking garage in order to create sloping toward the roof drains (in addition to the 2-inch slope of the steel structure) to assist with shedding water. The high point of the roof was between grids G and FX (see Appendix E for grid map) running in a north–south direction (i.e., between the Hotel and the entrance to the Mall’s escalator). The plan of the roof indicates water was supposed to split east and west along that line, moving toward the nearest drains. At this highest point, between gridlines G and FX, the drawings indicated a 5-inch layer of topping.<sup>57</sup> One of the building’s expansion joints was located directly to the east of this high point, between gridlines F/Fx. The designed slope across that expansion joint and east toward gridline E was 0.5 percent, which was described by Christopher Hughes, NORR’s architect, as “pretty low.”<sup>58</sup> The concrete topping was shown in the drawings as terminating essentially flush to the surrounding poured concrete parapet walls (a low, protective wall-like barrier along the edge of a roof) with a 2-inch slope away from those walls.<sup>59</sup> The architectural drawings showed flashing (a thin, continuous piece of sheet metal installed to prevent the passage of water into a structure from an angle or joint) at the base of the hotel walls where they meet the roof deck, and at access stair walls at the roof deck. These details also show the sealer terminating at a “sealant” bead under metal flashing, usually about 6 inches above the roof deck surface.<sup>60</sup>

Additional joints, called crack control joints, were purposefully created in the concrete topping, located above the grouted space between every third core slab panel (i.e., along the long end of every third slab). This placement was part of the Algo Mall’s waterproofing system. The creation of these crack control joints, and the waterproofing of both the crack control and the butt joints, will be discussed in greater detail below.

Roof drains were located throughout the surface of the parking deck. The original design documents contemplated 19 single roof drains.<sup>61</sup> Crickets, a term used to describe a localized raising of the roof profile, with the purpose of shedding water by creating slope and pushing it from high points to low points and drains, were located throughout the roof.<sup>62</sup>

The steel framing supporting the roof and interior floor slabs was designed to have spray fireproofing applied to it to protect the beams from weakening and collapsing in the event of a fire.<sup>63</sup> Some areas, such as certain sections of Woolco, were not required by the *Fire Code* to have fireproofing on the beams.

## Applicable *Building Code* and other standards at the time

The applicable codes and standards in force when the Mall was constructed in 1979 were:

- The 1975 Ontario *Building Code* (Ontario Regulation 925/75);
- the *National Fire Code of Canada* 1977; and
- CSA S16-1969 Steel Structures for Buildings and CSA W59-1977 Welding Steel Construction.

The CSA<sup>64</sup> standard for Parking Structures, CSA S413-07 Parking Structures, did not exist at the time the Algo Mall was constructed; it was not published until 1987. Similarly, the Canadian Parking Association released the Parking Facility Maintenance Manual in March 1988 and last updated it in July 2005.<sup>65</sup>

## Professionals involved in the design and construction of the Algo Centre

James W. Keywan prepared the architectural design of the Mall in 1979.<sup>66</sup> The structural design of the building was carried out by the Beta Engineering Group Ltd. (Beta), and stamped by John J. Kadlec, P. Eng.<sup>67</sup> As mentioned, the steel for the Mall and Hotel was fabricated, supplied and installed by York.<sup>68</sup> The hollow core slabs were designed, fabricated, supplied, and installed by Coreslab.<sup>69</sup> Trow prepared the geotechnical / soils condition report in 1978.<sup>70</sup> Algocen acted as its own general contractor for the construction of the Mall.

### The architect, James Keywan, accepted a limited retainer for the design of the Algo Mall

#### Mr. Keywan's professional background

James Keywan was first licensed as an architect in 1952 or 1953 in Ontario. He stopped practising at the age of 65, around 1990. At the time of his testimony, he was 88.<sup>71</sup> He studied architecture at the University of Toronto.<sup>72</sup> For the duration of his career he was a licensed member in good standing of the Ontario Architects Association, and he eventually became a lifetime member, a title given to those with an unblemished record of practice in the field.<sup>73</sup>

Before working on the Algo Centre project, Mr. Keywan had done other work for Algocen, including a Holiday Inn in Sault Ste. Marie and a senior citizens home and office building at Algocen's Station Mall site, also in Sault Ste. Marie.<sup>74</sup> Following the Algo Centre project, he worked for Algocen on a further addition to the Station Mall, at some point in the 1980s.<sup>75</sup>

### Algocen was its own general contractor; its vice-president, Nicholas Hirt, controlled the project

Algocen retained Mr. Keywan, whose contact person was Nicholas Hirt, at the time the firm's vice-president and in charge of its real estate holdings. Mr. Hirt is now deceased. Mr. Keywan knew Mr. Hirt was a civil engineer, trained in Hungary and licensed to practise in Canada. Mr. Keywan testified that Mr. Hirt, before being hired by Algocen, had been the chief plans examiner for the City of Sault Ste. Marie. In addition to dealing with Mr. Hirt, Mr. Keywan dealt with Ward Pinnell, to whom Mr. Hirt delegated some of the work.<sup>76</sup>

Mr. Keywan recalled that Mr. Pinnell was the construction manager for the Algo Centre project.<sup>77</sup> As the general contractor for the Algo Centre project, Algocen hired all the subcontractors except for the project engineer, Mr. Kadlec.<sup>78</sup>

Around 1977–8, Mr. Keywan retained Beta Engineering and Mr. Kadlec for the Algo Centre Mall project.<sup>79</sup> Mr. Keywan and Mr. Kadlec worked together, with Mr. Kadlec creating the structural drawings. Mr. Keywan

indicated that if Mr. Kadlec had questions he asked them of him, all the while working to satisfy the requirements of the Ontario *Building Code*.<sup>80</sup> Mr. Keywan explained that the decision to use steel framing and pre-cast concrete was likely an “economical” one related to the fact that Elliot Lake was at least a hundred miles from a batching plant where poured-in-place concrete could be acquired.<sup>81</sup>

### **Mr. Keywan advised against uncovered rooftop parking and was told there was no other option**

In the initial discussions with Mr. Hirt about the concept drawings, Mr. Keywan had asked whether the parking would go underneath the Algo Centre. Mr. Hirt, who at the time had the results of the soils tests, advised him that this option wasn’t possible because of the boulders and rocks at the site. Mr. Keywan testified that he asked about additional land, in order to have open parking – something he described as “by far the cheapest, other than the cost of the land and surfacing.” Mr. Hirt advised him that they could not acquire any additional land. Mr. Keywan then asked about the possibility of building a parking tower nearby, and was again told, and he agreed at the time, that there was not enough room on the site for that option.<sup>82</sup>

Algocen advised Mr. Keywan that the only option was to build the parking on the roof. Mr. Keywan testified that he was uncomfortable with the concept of rooftop parking because of the retail space below and asked Mr. Hirt about putting a roof over the parking deck.<sup>83</sup> (The roof Mr. Keywan was proposing would have been made of light steel.) This option was never costed out by Mr. Keywan for Mr. Hirt.<sup>84</sup>

Mr. Keywan’s concern, and the reason for his alternative suggestions, was that he had never designed a parking space like this one and it was not a common thing to do. He was concerned about the problems that roof leaks or road salt might create and was not sure how to ensure dry retail space below without a lot of trouble and expense, especially in a place like Elliot Lake with regular snowfall and cold winters. Despite Mr. Keywan’s concerns, Mr. Hirt told him that a roof over the roof parking area would be too costly.<sup>85</sup>

Mr. Keywan never advised Algocen that he was unhappy, as a professional, with the system chosen or expressed his concerns in writing to Mr. Hirt because he felt he “didn’t have to say that to a man who knew this ... he was an engineer. He knew the problems with salts and that better than I did. He was a very, very knowledgeable man.”<sup>86</sup>

Mr. Keywan said he also suggested that the columns above the parking level be made into stub columns (columns that do not have footing and rise from beams or slabs for upper levels) so that Algocen could add the roof above the deck if problems arose or use the space for expansion if the Mall became successful. This suggestion was rejected on the basis that it was too costly.<sup>87</sup>

### **Mr. Keywan viewed his mandate as “limited” and not extending to the waterproofing system**

Mr. Keywan agreed that normally the architect would be responsible for designing the waterproofing for the building, and in particular the roof. For the Algo Mall, Mr. Keywan insisted that neither he nor Mr. Kadlec was responsible.<sup>88</sup> Mr. Hirt and Algocen took on this responsibility.<sup>89</sup> Mr. Keywan considered his mandate limited to the preparation of drawings for the site, first for Ontario Municipal Board approval and then for the actual construction.<sup>90</sup> The only exception was that Mr. Keywan had been given responsibility for hiring the structural engineer “because of the close relationship in drawings.”<sup>91</sup> Otherwise, he testified, he had no other obligations to the project, aside from “any explanation necessary on the drawings, et cetera.”<sup>92</sup>

Mr. Keywan testified that his limited mandate with Algocen was not reduced to writing, explaining that this formality was not suited to the relationship between an architect and a client who was both engineer and developer.<sup>93</sup>



### **Mr. Hirt chose the Harry S. Peterson waterproofing system**

According to Mr. Keywan, he had no responsibility for the choice of the waterproofing system, nor was he asked to approve it.<sup>94</sup>

Mr. Hirt advised Mr. Keywan that the waterproofing system to be used for the rooftop parking was to be supplied by a Michigan-based company called Harry S. Peterson Company (HSP). Mr. Hirt further advised him that HSP had given assurances that the parking deck could be waterproofed with this system. Mr. Keywan accepted this information and indicated to the owners that he would do everything possible to accommodate whatever system Algocen put on the roof for waterproofing. "And that was the way it was left,"<sup>95</sup> he testified. Mr. Keywan never met the HSP people and assumed they were the experts on the topic.<sup>96</sup> He testified that his involvement with the selection and application of the HSP waterproofing system was minimal to non-existent. As well, I heard corroborating evidence indicating that HSP was also responsible for the sloping and for the drains on the roof, since these were integral to the entire system of getting water off the roof.<sup>97</sup>

Mr. Keywan had no knowledge of the HSP system and recognized at the time of construction that things often change in the construction industry. Mr. Keywan was willing to go along with Algocen's waterproofing choice because he "had complete faith in him [Mr. Hirt]."<sup>98</sup>

To the extent that Mr. Kadlec, the engineer, may have understood that Mr. Keywan was involved in the decision to choose the HSP system, Mr. Keywan testified he did not recall having said anything other than that Mr. Hirt had found a system which was guaranteed to his satisfaction.<sup>99</sup> Elsewhere in Mr. Keywan's testimony, he said he probably would have told Mr. Kadlec that Mr. Hirt selected the system because he thought it was the most economical one for the project.<sup>100</sup>

### **Mr. Keywan met the professional standards for architects at the time of construction**

Mr. Keywan's drawings were criticized by Mr. Hughes, NORR's architect, for failing to describe the waterproofing system that was eventually installed. The detailing on the architectural drawings was also found inadequate. Mr. Hughes testified that the drawings "didn't even reflect what I think was in the end, installed by HSP. There was no mention of the waterproofing strips below the topping." He felt Mr. Keywan, as Algocen's architect, had a responsibility to show these features on his own drawings. "We would expect that the person preparing the [design] drawings would have consulted with manufacturers about a waterproofing solution that was appropriate for that roof," Mr. Hughes said, "and that the detailing reflected on the drawings would have carried that through."<sup>101</sup> Furthermore, Mr. Hughes felt that Mr. Keywan continued to bear responsibility for the waterproofing system even if the owner selected it.<sup>102</sup>

Although highly critical of Mr. Keywan's work, Mr. Hughes acknowledged that Mr. Keywan was allowed to defer responsibility for the waterproofing to Mr. Hirt and Algocen. Mr. Hughes nevertheless believed that this course of action was not appropriate, and that Mr. Keywan should have taken a greater role and responsibility for specifying and detailing the waterproofing system.<sup>103</sup> Mr. Hughes did note, though, that Mr. Keywan "expressed some concerns about the system, as he had never seen it before." In the end, Mr. Keywan relied on Mr. Hirt, who had spoken to HSP and others.<sup>104</sup>

Out of concern that the Commission might make findings of negligence or that Mr. Keywan's conduct might be found to have fallen below the standard of care for architects at the time (despite this issue being outside the mandate of the Commission), Mr. Keywan's counsel sought and was granted leave to enter the report of architect Allan Larden as an exhibit at the Inquiry. In addition, at the request of Mr. Keywan's counsel, Mr. Larden was called as a witness.

Mr. Larden graduated from the University of Waterloo with a bachelor of architecture in 1973 and worked in private practice as a graduate architect from 1973 to 1978. In 1978, he became a registered architect in Ontario. From 1978 to 1988, he worked for the Government of Ontario and was responsible, along with others, for the administration section of the *Building Code Act* and the Ontario *Building Code*. In that position, he provided advice to building officials and designers on the enforcement and application of the *Building Code* and participated in drafting amendments to it setting out the mandatory roles of architects and engineers with respect to the design and review of the construction of buildings. He said that changes made to the regulatory framework for architects in 1984 were the result of the type of work he was involved in.<sup>105</sup> He left the public service in 1988 and in 1989 co-founded a *Building Code* and fire protection consultancy. In 2012 he became a sole practitioner, operating a *Building Code* consulting business focused largely on reviewing project designs, assisting in disputes, and occasionally appearing before tribunals. His specialty relates to the interpretation of the Ontario *Building Code*.<sup>106</sup>

Mr. Larden expressed the opinion that Mr. Keywan's architectural drawings met the requirements of the Ontario *Building Code* of the time and any other governing by-laws and standards. He disagreed with Mr. Hughes's opinion that the drawings "narrowly" met Code and other requirements.<sup>107</sup> Mr. Larden opined that the Code requirements to shed or drain water effectively were satisfied on the basis of a couple of indications on the drawings that there would be sealant over the deck and certain edge treatments, and that nothing indicated "there was going to be a failure of those treatments."<sup>108</sup> He considered, though, that the required level of detail in drawings was a matter of convention and, sometimes, debate. He was "not aware of anything which constrains it in any particular fashion, other than the opinion of other professionals [and] circumstances."<sup>109</sup> In essence, Mr. Larden did not feel that the architectural drawings should be considered the ultimate source for documentation on the application of the waterproofing system, given HSP's responsibility.<sup>110</sup> He felt similarly about the absence of roof-drain details, since it would have been reasonable to expect that HSP would ensure this aspect was dealt with to its satisfaction.<sup>111</sup>

Mr. Larden agreed that Mr. Keywan's drawings did not include a reference to the use of the Peterson waterproofing system,<sup>112</sup> but he considered this omission of no consequence. The responsibility for designing, specifying, and installing the waterproofing system for the parking deck had been handed over by the owner to an expert entity (HSP) "who at least held itself out as being specially qualified in that sort of work," and Mr. Larden felt it was reasonable to expect that HSP would determine where to apply the various components of the system.<sup>113</sup>

Mr. Hughes and Mr. Larden both agreed that Mr. Keywan's architectural drawings met the requirements of the *Building Code*. The degree to which these requirements were met is where their opinions differed. It is clear to me that the manner in which Mr. Keywan carried out his mandate, although no longer appropriate by today's standards and regulations,\* was not prohibited at the time of the construction of the Algo Mall.<sup>†</sup>

.....

\* Mr. Larden referred in his report to section 16(4) of the *Architects Act*, 1970, RSO 1970, c 27, s 6(4), which states that "nothing in this Act prevents ... any member ... of the Association of Professional Engineers of the Province of Ontario ... from performing architectural services in the course of any work undertaken or proposed to be undertaken by such member or licensee as an engineer." He also pointed to sections 2.3.1 and 2.4 of the 1975 Ontario *Building Code*, which, as explained earlier, allow for design of a building such as the Algo Centre by an architect, an engineer, or both. Mr. Larden told the Commission that today, although architects are prohibited from doing engineer's work and vice versa, one exception exists, and it allows an engineer to perform architectural services where it is a minor component of a project that is substantially engineer-oriented. The reverse is true for an architect, who can perform engineering services that are a minor component of architectural work. Mr. Larden's counsel referred him, in particular, to section 11(4) of the *Architects Act*, RSO 1990, c A.26, which governs the relationship between architects and professional engineers.

† Larden testimony, July 30, 2013, pp. 19090–2. Mr. Larden indicated that neither the *Architects Act* nor the Ontario *Building Code* stipulated in detail the degree to which an architect had to design and specify particular elements of a building, or the degree to which the architect had to undertake a general review of the construction. The *Architects Act* and Regulations were silent on the degree of necessary detail, and Mr. Larden said that they still are.



Mr. Larden pointed out in his report and testimony that, although it was not recommended at the time that architects provide partial services, doing so was not prohibited:

In item 1 under Methods of Practice, the Ontario Association of Architects May 1977 Guidelines on Methods of Architectural Practice and Conflicts of Interest recommended “that Architects avoid providing partial services wherever possible” but did not prohibit provision of partial services. In the time frame of the design and construction of the Algo Centre Mall, it was more common than it is now for an architect to be engaged to provide partial services (such as preparation of drawings but with limited or no general review), as regulations did not specifically require the provision of complete services, and the realities of the construction market place were such that builders sometimes chose to minimize expenses by not engaging architects to provide complete services.<sup>114</sup>

The practice of professionals (architects and engineers) providing partial services appeared to be prevalent in the era of the construction of the Mall. Thankfully, those practices have since changed. No evidence was presented to suggest that the current design practices and standards as regulated by the various acts, regulations, and by-laws are improper or that recommendations should be made to change current practices or standards.\*

### Mr. Keywan had almost no involvement after construction

Mr. Keywan took part in an August 1981 meeting (described in greater detail later in this chapter) to discuss the leaks. There was no other evidence to show that Mr. Keywan’s assistance was sought by Algocen to find a solution to stop the leaks. He was unsure of the location of the meeting, but testified that he never attended a meeting in Elliot Lake, and reiterated that he never actually saw the Algo Centre in person.<sup>115</sup>

Following his review of the notes of the meeting, Mr. Keywan maintained that the leaks were not his problem to fix.<sup>116</sup> Mr. Keywan testified that he knew there were leaks at that point in time but he was not told that he needed to solve or know anything about the leaks.<sup>117</sup>

Mr. Keywan did not keep track of the leak issue after this meeting since he did not believe it was his responsibility given his limited contract:

I think I told you what my work was at the building. It was to design the architectural – you call it a concept – concept, do the working drawings, not specifications, hire a structural engineer, make sure that he would check all the shop drawings ... And that was the whole contract.

So ... I don’t understand what you are trying to get at on there. That I designed the building? Yes, I designed it. But I didn’t design any leaks in it.<sup>118</sup>

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\* Larden testimony, July 30, 2013, pp. 19091–2. Mr. Larden said that when the *Building Code* was changed in 1984, following on changes to the *Professional Engineers Act* and the *Architects Act*, new standards were placed on architects and engineers with respect to field review. No such standards were stipulated in 1979–80. Mr. Larden referred in particular to a new set of requirements put in place, in 1984 it seems, requiring review of building design in relation to the new home warranty program. These requirements had to do with new condominium apartment buildings that were handed over to the condo corporation by the owner, only for the corporation to find fault with construction after the fact. In Mr. Larden’s opinion, these things combined to create a more stringent environment when it came to the involvement of professionals in general review of construction: Larden testimony, July 30, 2013, pp. 19092–3. However, Mr. Larden also added that, even today, the necessary level and content of review have not been “pinned down.” The nature of review depends on the circumstances and the type of building. The only clear requirement in the *Architects Act*, *Professional Engineers Act*, and *Building Code* of today is that, to paraphrase, where an architect designs the building, it must be reviewed by an architect, and when designed by an engineer, it must be reviewed by an engineer. Otherwise, the number of hours spent, the number of visits, and so forth, are not set out: Larden testimony, July 30, 2013, pp. 19095–6. Mr. Larden further added that, even today, it is not clear that architects are prohibited from providing partial services. Today, although there is a requirement that a building designed by an architect be reviewed by an architect, there is no requirement that it be the same architect throughout: Larden testimony, July 30, 2013, p. 19101.



## **Engineer John Kadlec prepared the structural drawings but was not provided with the full details of the intent of the waterproofing design**

### **Mr. Kadlec's professional background**

John Kadlec prepared the original structural design of the Algo Mall. At the time, he was a registered professional engineer<sup>119</sup> and, at the time of his testimony, continued to practise as a registered professional engineer in Ontario.<sup>120</sup> He graduated in 1965 with a master's degree in engineering from the University of Prague. He came to Canada in 1970 and obtained immediate employment with JB Parking and Associates. In Ontario, he successfully applied to be certified as a professional engineer and was accepted without having to write any exams because graduates of his university were exempted from exams in Ontario. When JB Parking dissolved shortly after his start there, he worked for a time with a Swiss company that owned and operated cement plants until, in the mid-1970s, he started his business – Beta<sup>121</sup> – with Peter Kodeda. Mr. Kodeda, who had worked previously on projects with Mr. Keywan, was also involved in the structural design of the Algo Mall, both as the designer and throughout the construction process. He is now deceased.<sup>122</sup>

Mr. Kadlec had not done any work with Algocen before his involvement in the Algo Centre. He later worked on an expansion of the Station Mall in Sault Ste. Marie.<sup>123</sup>

### **Mr. Kadlec provided structural engineering services and was not consulted about the waterproofing**

Beta's mandate was to do the structural engineering work for the Algo Centre project, which was to include preparation of drawings and review of documents submitted during construction, such as shop drawings and test reports.<sup>124</sup> Mr. Kadlec explained that his contract was with Mr. Keywan's company, while Coreslab and York would have had direct contracts with Algocen.<sup>125</sup>

The structural drawings were prepared by Beta's draftsmen and based on information given to them by Mr. Kodeda and Mr. Kadlec. Mr. Kadlec's stamp is on the drawings.<sup>126</sup>

Mr. Kadlec was not involved in the decision to use steel and hollow core precast slabs for the construction of the roof. His recollection was that these materials were chosen for economic reasons and also because of the distance to the nearest concrete-batching plants.<sup>127</sup> Nor was he involved in the decision to put the parking on the roof, which he clearly remembered was made before his involvement.<sup>128</sup>

Mr. Kadlec explained that the use of hollow core precast slabs on steel beams and columns was a common construction method at the time, but it was "unique to put the parking on top of the retail stores ... Unusual I think."<sup>129</sup> He was not aware of any place where it had been done before,<sup>130</sup> and he did not like it as a design, asking, "Especially in this area where you have plenty of land, why put the parking on top of the roof?"<sup>131</sup> Even if there land was unavailable, he was concerned about issues such as the movement of cars and snow removal. Structurally, though, he thought it was acceptable. His concerns related more to the practicalities of snow removal and maintenance.<sup>132</sup>

Throughout the project, Mr. Kadlec dealt with Mr. Keywan, but he also recalled having conversations with Mr. Hirt and Mr. Pinnell. He testified that he visited Mr. Hirt a "few times" in Sault Ste. Marie and did go to Elliot Lake three or four times during the construction process, making a total of no more than six visits with Mr. Kodeda.<sup>133</sup> His first visit was after construction had started. He had not viewed the site before preparing his design.<sup>134</sup>

Mr. Kadlec testified that although he believed he talked to Algocen about his concerns related to the practicalities of having the rooftop function as a parking lot, the decision had not been his to make. Beta Engineering was never asked to look for alternative locations for parking. The scope of his company's work was limited to the structural design for the building and roof / parking deck. His mandate did not include waterproofing the hollow core slabs.<sup>135</sup> Mr. Kadlec testified that he had no discussions with the designers of the waterproofing system. In 1979–80, he had no knowledge of the waterproofing systems available on the market.<sup>136</sup>

Mr. Kadlec contradicted Mr. Keywan's assertion that he had never been to Elliot Lake during construction. Mr. Kadlec testified that Mr. Keywan was with him during inspections of the Elliot Lake project.<sup>137</sup>

### **Observed construction problems were corrected**

Mr. Kadlec recalled that his first visit was when the foundation was poured for the columns, and he was unhappy with the workmanship he observed. Specifically, he mentioned missing bolts for the columns and problems with the levelling plates.<sup>138</sup> He also agreed that there was the serious problem with the building being out of plumb, which required that it be anchored to the rock face.<sup>139</sup> He said, however, that all these problems were eventually fixed. He was able to say so because Trow had been hired to do inspections – and either he or his partner saw those inspection reports, which indicated that these deficiencies were corrected.<sup>140</sup>

### **Mr. Kadlec's design required the core slabs to support 120 psf**

The design prepared by Mr. Kadlec called for a superimposed load of 120 psf. Mr. Kadlec explained that "superimposed load" included both live and dead loads, exclusive of the weight of the precast panels.<sup>141</sup> Therefore, nothing put on top of the slabs could exceed that load.<sup>142</sup>

The determination of the figure of 120 psf as the superimposed load for the roof was calculated by including the live load from snow and cars; and the dead load from the mechanical system, the systems suspended from the underside of the slabs, and essentially the permanent installations affixed to or on the hollow core slabs, including the topping.<sup>143</sup>

The weight of the snow was assumed to not exceed 27.5 psf. This figure was based on the ground-snow load for Elliot Lake, which was 55 psf. The *Building Code* required that the design for the roof of a building needed to be able to carry half of the ground snow load (27.5 psf).<sup>144</sup>

The drawings specified that, at the northern edge of the building (adjacent to the Hotel), the superimposed load needed to be 130 psf. Mr. Kadlec testified that this increased load requirement could have been to account for the additional live load due to snow piling against the Hotel wall.<sup>145</sup> The requirement of a higher loading along the Hotel wall would have been in accordance with the provisions in the Ontario or Canadian *Building Code*. Mr. Kadlec explained that where a flat roof meets an adjacent building, as was the case of the parking deck and the Hotel at the Algo Mall, there is a natural tendency for snow to accumulate against the wall of the building, thereby triggering the requirement to account for the extra load in the structural design.<sup>146</sup>

The loads calculated for the rooftop parking were based on the assumption that the roof would hold only passenger cars and the expectation was that any snowplow used would not exceed the weight of a passenger car. At the time he prepared his design, Mr. Kadlec understood that a barrier blocking the entry of larger vehicles would be placed at the entrances to the parking deck.<sup>147</sup>

The structural drawings did not provide the breakdown between dead and live loads for the roof level of the Mall. The Coreslab shop drawings did, however, set out a live load of 75 psf and a dead load of 45 psf for the rooftop parking.<sup>148</sup>

NORR helped to supplement the evidence given by Mr. Kadlec on the live-load requirements for the roof level. The 1975 Ontario *Building Code* stipulated that the required live load for passenger cars was 50 psf, and the snow-load requirement would have been 27.5 psf (50 percent of ground snow as discussed by Mr. Kadlec). The total designed live load was therefore 77.5 psf, which had the effect of reducing the available dead load to 42.5 psf.<sup>149</sup>

NORR commented that the extra 10 psf allowed in the drawings for snowdrift up against the Hotel wall was a bit too low, but acceptable, and not in any way a factor contributing to the eventual collapse of the building.<sup>150</sup>

Mr. Kadlec explained that at the time he made these drawings he did not know what the roofing system would be. He agreed he just had to put “good numbers” in and, essentially, guesstimated or made allowances.<sup>151</sup> Mr. Kadlec testified that once advised of the type of waterproofing to be installed, he redid his design calculations to make sure they still worked and discussed them with Mr. Keywan. Mr. Kadlec did not believe he had to make any changes to his design as a result of the selection of the waterproofing system.<sup>152</sup>

Mr. Kadlec testified that he understood that Coreslab would have designed the slabs to meet the superimposed load set out in the structural engineering drawings.<sup>153</sup>

### **Mr. Kadlec’s design called for insulation above the core slabs but the Mall was constructed with the insulation below them – thereby increasing thermal movement**

Mr. Kadlec was not concerned, from a structural perspective, about the placement of the insulation for the roof (i.e., on top of the hollow core slabs as opposed to underneath). Initially Mr. Kadlec was unable to say whether having the insulation on top of the slabs would have affected the thermal expansion of the slabs. He subsequently agreed that having the insulation on top of the slabs would have affected the expansion and contraction that could occur during seasonal cycles.<sup>154</sup>

Ms. Saari, the Coreslab engineer, indicated that hollow core slabs are generally used within the building envelope and therefore not exposed to freeze–thaw cycles. However, she was not necessarily concerned that the slabs at the Algo Centre were outside the insulation.<sup>155</sup> She acknowledged that this configuration placed more of an onus on the architect “to develop a detailing system that would account for that.”<sup>156</sup> She further indicated that Coreslab does not typically deal with the issue of thermal expansion in designing its slabs and expects that the engineer of record will set out any necessary expansion joints.<sup>157</sup>

The Commission heard additional evidence from Dale Craig, a highly experienced engineer. He corroborated Ms. Saari’s suggestion (and Mr. Kadlec’s admission of sorts) that the placement of the hollow core slabs outside the building envelope could have resulted in thermal movement of the slabs. Mr. Craig explained that if the insulation had been installed according to Mr. Kadlec’s original design, the thermal movement of the slabs could have been more effectively controlled. He considered that the decision to place the insulation underneath amounted to a “significant change with respect to the construction of the building envelope.”<sup>158</sup> Not only would such a change have affected the positioning, range of movement, and temperature exposure of the core slabs,

NORR commented that the extra 10 psf allowed in the drawings for snowdrift up against the Hotel wall was a bit too low, but acceptable, and not in any way a factor contributing to the eventual collapse of the building.



Mr. Craig explained, but it also would have affected the effectiveness of the vapour barrier that was required to be placed on the warm side of the insulation. The vapour barrier and the insulation would be less continuous because of beams and other obstructions encountered inside the building, below the core slabs. This lack of continuity would have allowed the interior moisture to move through and condense within the system, allowing moisture from the interior of the building to penetrate the insulation and permit the travel of heated and moisture-laden air to the underside of the hollow core slabs.<sup>159</sup>

**Mr. Craig also questioned the wisdom of exposing the pre-cast concrete to freeze-thaw cycles.**

Mr. Craig also questioned the wisdom of exposing the pre-cast concrete to freeze-thaw cycles. His understanding was that concrete subject to freeze-thaw conditions should usually have “entrained air content” (i.e., small air bubbles mixed uniformly through the concrete to allow it to withstand the freeze, thaw, and expansion forces from entrapped water), stating: “I don’t think that you should apply a precast concrete slab such as these in a situation where it is going to be exposed to moisture and freeze-thaw cycles.”<sup>160</sup> He added, though, that the potential negative effects may have been offset somewhat by the heat loss from the interior of the building due to the occasionally discontinuous insulation and vapour barrier, which meant that the underside of the slabs was likely above freezing temperature at all times and the top surface exposure to freeze-thaw was attenuated by the same effect.<sup>161</sup> In sum, however, he said he would not use hollow core slabs in any case where they were exposed to freeze-thaw cycles, and that he did not think the designer knew this result would occur because of the indication on the drawings that the insulation would be on top.<sup>162</sup>

Mr. Kadlec acknowledged that it was his responsibility to design the expansion joints, which he did. However, it was someone else’s responsibility to ensure that the expansion joints were carried up through the concrete topping placed on top of the hollow core slabs.<sup>163</sup> The design prepared by Mr. Kadlec called for a 2-inch gap at the expansion joints. Mr. Kadlec testified that the placement of the insulation underneath the slabs would not affect the size of the gap for the expansion joint.<sup>164</sup>

In 1996, Paul Meyer, an engineer retained by Algocen, found that the hollow core slabs had moved and closed the expansion joint located at gridlines 10 and 10X. Dr. Hassan Saffarini from NORR reviewed this situation and agreed that the design of the building should have allowed for sufficient movement of the slabs without this kind of contact. It seems that NORR concluded that this event was not significant in relation to the collapse.<sup>165</sup>

However, despite these design flaws and limitations, including placing the hollow core slabs outside the protection of the building envelope, NORR concluded that the thermal movement and exposure of the slabs to the freeze-thaw cycle did not cause the collapse (see Chapter 3, Causes of Collapse). I do not disagree, although common sense would indicate that these conditions may have exacerbated water penetration.

### **Mr. Kadlec’s work at the Algo Mall appears to have met the professional performance standards for engineers at the time of construction**

The Professional Engineers of Ontario (PEO), the licensing and regulatory body for professional engineers in the province, is responsible through the operation of its Professional Standards Committee to develop performance standards, practice guidelines, and practice bulletins.<sup>166</sup> At the time of construction of the Algo Mall, the PEO had issued the January 1977 practice guideline entitled “Performance Standards for Professional Engineers Providing Structural, Mechanical, or Electrical Services for Buildings” (the 1977 guideline). This document, although called a performance standard, functioned as a guideline and, despite its title, dealt only with structural engineering.<sup>167</sup>

The 1977 guideline identified four phases of work: (1) preliminary design; (2) final plans and specifications; (3) general review during construction; and (4) special services.<sup>168</sup> With respect to the preliminary design phase,

the 1977 guideline required that the engineer abide by the applicable codes and regulations. In particular, section 3.1.3 of the 1977 guideline required

The Engineer shall report to the employer on the preliminary design concept and the reasons for its recommendation. The report shall give alternatives studied, their advantages or disadvantages, preliminary cost estimates for the recommended design and other information which may be required by the employer to fully assess the choice.<sup>169</sup>

The 1977 guideline provided that the preliminary design phase could be undertaken by the owner of a building so long as doing so would not prevent the engineer from satisfying the requirements for the final plans and specifications and general review.<sup>170</sup> The guideline stipulated that the final plans and specifications phase was the stage where the engineer was to analyze and design the structural system in conformity with the applicable codes and regulations, among other obligations.<sup>171</sup>

The general review requirements set out in the 1977 guideline provided that the engineer was responsible for providing general review services during construction. The guideline, however, recognized that an owner might decide not to retain the design engineer to fulfill this task. In such a case, the guideline suggested that the design engineer recommend to the owner in writing that a professional engineer be retained to provide these services. The 1977 guideline described the general review as being conducted by “means of a rational sampling procedure.” It did not require the engineer to review every element of the structure.<sup>172</sup>

It is not my role to make findings of liability or to determine whether the professionals involved with the Algo Mall during its lifetime met the requisite standard of care in carrying out their respective duties.

It would appear, based on the evidence presented during the Inquiry and the conclusions reached by NORR following its investigation, that the structural design of the Algo Mall likely met the requirements of the 1975 Ontario *Building Code*. The review of the erection of the structural steel, although not undertaken by Mr. Kadlec, was performed by Trow, a company retained by Algocen for that purpose. After reviewing the 1977 guideline, which was simply that, a guideline, and after reviewing the evidence available from the time of the original construction, I am of the view that it is likely that Mr. Kadlec met the spirit and intent of the 1977 guideline.

### **Mr. Kadlec was not involved in attempting to fix the leaks**

Mr. Kadlec had no involvement in the Algo Centre thereafter. He was never asked to provide advice on how to stop the leaks during the warranty period.

### **There was no clear prime consultant during construction**

During the Commission’s hearings, a question arose on whether Mr. Keywan was the prime consultant for this project. The term prime consultant and its interpretation and application within the construction industry are more fully outlined in Chapter 2, Background. Mr. Keywan took issue with being labelled the prime consultant for the Algo Centre project, given his limited retainer as he described it in his evidence.<sup>173</sup>

Mr. Keywan described the Algo Centre project as an owner / builder project and not one led by the architect. He explained that in this type of project, the architect provides only the drawings necessary to get a building permit. His was a “partial services contract or arrangement,” although this description was never reduced to writing.<sup>174</sup> This evidence appears to be contradicted by Mr. Keywan’s signature on the certificate of substantial compliance. This evidence is addressed in the following section.

Mr. Keywan considered that the label “prime consultant” was meaningless. He was aware of the *Architects Act*, which states that an architect or a professional engineer may act as the prime consultant for the construction of

a building, and further agreed there is a similar provision in the *Professional Engineers Act*. He disagreed, though, that this was an important statutory role in the construction process, pointing out that there is no definition of “prime consultant” in either statute. He said that although this person could be the architect, who has special knowledge about construction techniques and the *Building Code*, it could be, and often is, the owner.<sup>175</sup>

Although he may have been the “first” consultant, Mr. Keywan said he was not doing the work that some prime consultants might do, such as site reviews and reviews of tenders. It was Mr. Hirt who coordinated the roles of other consultants, such as the mechanical and electrical work, and hired the people: “Mr. Hirt was acting as a developer on the project and he knew what he wanted.”<sup>176</sup> Mr. Keywan maintained that his mandate was limited to the preparation of the drawings and any questions related to them.<sup>177</sup> Mr. Keywan said that, if he was a prime consultant, it was with respect to the architecture, while Mr. Kadlec was the prime consultant with respect to the structural engineering.<sup>178</sup>

An August 16, 1978, letter for tender from Vankesteren Electrical Contractors Ltd., addressed to Mr. Keywan, seemed to suggest he was more involved than he had suggested. Mr. Keywan indicated that this letter was probably sent to him only because it is assumed that the architect handles everything. Mr. Keywan stated that this document had nothing to do with his mandate on the project.<sup>179</sup> He added that he thought it was unlikely that Mr. Hirt did not understand his limited mandate.<sup>180</sup>

A November 22, 1978, letter to Mr. Keywan from Algocen suggested that his office would coordinate consultants, but Mr. Keywan said it did not do so. Mr. Hirt or Mr. Pinnell called the tenders and retained the necessary contractors. Mr. Keywan testified that he would have been willing to perform the coordination work because he would have been compensated for it. Mr. Keywan was insistent that his mandate did not include site supervision.<sup>181</sup> He pointed to a letter dated May 23, 1979, as illustrative of the work that fell within his mandate (e.g., making changes and additions to the drawings).<sup>182</sup> He also confirmed that a Contemplated Change Notice dated August 2, 1979, would have come to his attention, but his office would not have been qualified to address the issues. He would have forwarded it to Mr. Kadlec to comment on because it related to structural steel. Mr. Keywan was certain Mr. Kadlec would have approved this change.<sup>183</sup>

Mr. Kadlec, on the other hand, believed that Mr. Keywan was the prime consultant during construction.<sup>184</sup>

Despite Mr. Keywan’s denial that he was the prime consultant, I am inclined to believe that he constituted at least a modified version of a prime consultant. I refer to the following evidence in support of this finding:

- Mr. Kadlec’s belief that Mr. Keywan was the prime consultant. I found Mr. Kadlec to be forthcoming and reliable in his evidence on this point.
- Mr. Keywan was copied on correspondence related to steel installation and delay (a letter dated September 14, 1979, from Algocen to York Steel).<sup>185</sup>
- Mr. Keywan’s office appeared to be taking a leading role in coordinating the construction process. A November 29, 1979, memo from him to Algocen’s Robin Green (and copied to Messrs. Hirt and Pinnell, Mr. Kadlec, and others) outlined the procedure for drilling precast as discussed at a site meeting and over the phone and set out the roles of the mechanical trades, the Coreslab engineer, and Beta Engineering.\*
- All the structural steel review reports prepared by Trow were provided to Mr. Keywan.<sup>186</sup>
- Mr. Keywan signed the certificate of substantial compliance.

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\* Keywan testimony, March 11, 2013, p. 951; Exhibit 1993. In his testimony, Mr. Keywan indicated the handwriting on the document at Exhibit 1993 likely belonged to Paul Roman.



## The certificate of substantial compliance was signed without an adequate or appropriate general review

There were requirements in 1979 under the *Building Code* for a general review of a building before the certificate of substantial compliance was signed, but the obligation to ensure that it occurred was placed on the owner. According to Mr. Larden, the Code and the *Architects Act* of the time were worded such that that review could be provided by an architect or an engineer, and not necessarily the same architect who designed the building.<sup>187</sup> Mr. Larden felt it was a debatable point as to whether it was inappropriate for Mr. Hirt, being both owner and engineer, to have conducted the design review, though he did not think it automatically created a problem of bias and a lack of objectivity.<sup>188</sup>

Mr. Larden testified that if the designing architect was to be responsible for subsequent review, he would have to be “engaged” (i.e., hired or paid to do it). Some builders and developers simply did not want to hire someone for the full slate of services. So, even if the architects might have preferred to provide full services, including final review, their ability to do so might have been limited by the owner’s willingness to pay. There was a “less stringent atmosphere” in the industry at the time.<sup>189</sup>

On August 5, 1980, Mr. Keywan and Mr. Kadlec signed and sealed a document indicating that “to the best of our knowledge, the Algo Centre Project at 151 Ontario Avenue has been substantially [*sic*] completed in accordance with our architectural and structural designs.”<sup>190</sup> Throughout the course of the hearings, the Commission heard differing perspectives on the importance of this document.

Mr. Keywan explained that, despite having signed this document, it was actually Mr. Hirt from Algocen who conducted the general review of the installation and construction of his architectural design.<sup>191</sup> When asked whether he was provided with any inspection reports stemming from Mr. Hirt’s review of his design, Mr. Keywan gave the following response, which essentially indicates that he was entirely reliant on Mr. Hirt’s word that all was well with the project:

I saw Mr. Hirt quite often and we were always in touch by phone, and he would tell me – if there was any problem on the project, he would have told me, but I didn’t hear of any, so that was it.

He told me that – he asked me to write this letter and, in fact, I believe at the time he – I shouldn’t say that because I don’t know, but it sounds like he would have asked me in those specific words to assign a certificate on it.<sup>192</sup>

When pressed further on what in particular he saw to satisfy himself that the construction had been completed substantially in compliance with the design, Mr. Keywan said it was “not a question of looking, I think.” He received all the Trow structural inspection reports, and his employees never heard of any problems with “anything that my office or the structural engineer’s office did.” He therefore felt that, in those circumstances, it was “quite acceptable” to sign the document based on the word of Mr. Hirt, who was the owner / developer.<sup>193</sup>

Mr. Keywan agreed that the reports from Trow related to the structural work at the Algo Centre (i.e., Mr. Kadlec’s domain). As such, other than by way of informal conversations with Mr. Hirt, Mr. Keywan had no feedback on the progress of building construction from an architectural perspective. His determination that the building was substantially complete was therefore based on reliance on the information he obtained from Mr. Hirt.<sup>194</sup>

Mr. Keywan made the following comment when asked whether Mr. Hirt's independence and judgment could be trusted, given that he was the building owner and construction manager:

Well, with his knowledge and the fact that I had known the man on other projects to be completely open and knowledgeable about everything, and certainly I made the reasonably logical assumption that he wouldn't pay for any work that wasn't properly done.<sup>195</sup>

Mr. Keywan was asked how he could have known if the waterproofing of the roof was substantially complete if he had no responsibility for that aspect of the project. He responded, "Well, I didn't know anything specific about it, but I wasn't told anything otherwise." Again, he took Mr. Hirt's word, saying one does not pay for something one is not happy with.<sup>196</sup>

Later in his testimony, Mr. Keywan seemed to agree that, on the date he signed the document, the building had to be watertight.<sup>197</sup> Mr. Keywan never asked Mr. Hirt if the building was watertight. He testified that he may have been aware at the time of signing the August 5, 1980, letter that there were leaks at the Mall, but he was not certain. He confirmed that he had been told by others involved in the project that there were a few water problems at the Mall.<sup>198</sup> Mr. Keywan subsequently changed his answer and stated that he didn't know about leaks before signing the document.\*

He was asked why, if Mr. Hirt had been entirely responsible for the waterproofing of the building, he had not asked that Mr. Hirt's engineering seal be on the certificate of substantial completion. Mr. Keywan thought this was "an interesting question" and said he'd never seen a situation before where the owner affixes a seal.<sup>199</sup>

NORR, and more specifically Mr. Hughes, was of the opinion that when Mr. Keywan stamped the letter of substantial completion, he was "taking responsibility for the design of the entire building."<sup>200</sup>

Mr. Larden, the expert retained by Mr. Keywan, gave his opinion on the significance and meaning of the document signed by Mr. Keywan and Mr. Kadlec on August 5, 1980. Mr. Larden specifically noted in his report that

Section 2.4 of the *OBC* required a person intending to construct a building governed by s. 2.3.1 (assembly or institutional occupancy buildings, and buildings exceeding 6000 sq feet in building area or 3 storeys in height) to ensure "an architect, a professional engineer or both" were retained to undertake the design and general review of the building during construction.<sup>201</sup>

Mr. Larden took issue with the suggestion that the document was created in response to the requirements in section 2.4 of the Ontario *Building Code* or the relevant sections of the Elliot Lake Building By-law.<sup>202</sup> Section 8(4) of Elliot Lake's Building By-law No. 78-47 provided the following requirement for a report to the Town of Elliot Lake following field review of construction designed by an architect or professional engineer:

Where such buildings and/or structures are required to be designed by an architect or professional engineer or both, are reviewed in the field during construction in accordance with the Ontario Building Code, Part 2, Section 2.3.1. (a) (b); 2.3.2.; 2.4.; and upon completion of the work for which the review was required, a report shall be submitted to the "Authority Having Jurisdiction" by the architect or professional engineer, or both, stating what was reviewed and where applicable, what was not reviewed and stating the extent to which the construction conforms to this by-law and the Ontario Building Code.<sup>203</sup>

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\* Keywan testimony, March 11, 2013, p. 1016. It should be noted that, throughout Mr. Keywan's testimony, Commission counsel referred to the document as a "certificate." Mr. Keywan never objected during his testimony to the use of the word. See, for example, Keywan testimony, March 11, 2013, pp. 1014–16.

Mr. Larden did not see the letter of August 5, 1980, as an attempt to satisfy this by-law requirement.<sup>204</sup> He agreed that if it was an attempt to comply with it, it failed. It did not address any of the requirements in section 8(4), such as describing the nature of the review conducted and stating the extent of compliance with the by-law and the Ontario *Building Code*.<sup>205</sup> Furthermore, if the letter was somehow a report on a general review, it would not have been acceptable that Mr. Keywan never went to the site and never received or requested any inspection reports from Mr. Hirt or anyone else, other than simply asking how the job was progressing. If there was a general review of the nature contemplated by section 8(4) of the by-law, it was conducted by Mr. Hirt or his staff, and not Mr. Keywan. The sparse exchanges between Mr. Hirt and Mr. Keywan did not qualify, in Mr. Larden's eyes, as any type of general review by Mr. Keywan.<sup>206</sup>

Mr. Larden also took issue with the document being called a certificate of substantial completion. He referred to it instead as a "letter."<sup>207</sup> Later in his testimony, he suggested it was a "comfort letter" for the municipality in case someone later alleged that the building was not substantially complete and, again, he said it had nothing to do with field review.<sup>208</sup>

The purpose of a certificate of substantial completion, according to Mr. Larden, was more to relay that a building was, in effect, built and to demonstrate that to those financing the building. He also said a certificate of substantial completion had implications for the release of monies to the various trades involved in the project.<sup>209</sup> He believed the reference to substantial completion in the letter was more a reference to the percentage of work completed, as opposed to being an indication of compliance with the Ontario *Building Code*.<sup>210</sup> However, he did admit that the letter created an inference that the building was designed to Code.<sup>211</sup>

Along these lines, Mr. Keywan suggested in his final submission, presented by his counsel, that the reference to substantial completion could have its origins in section 1(3) of the former *Mechanics Lien Act*. It defined "substantial performance of a contract," which is deemed to have occurred when the work or a substantial part thereof is ready for use or is being used for the purposes intended, and when the work contracted for is capable of completion or correction at a cost of not more than a prescribed formula. In Mr. Keywan's submission, substantial performance under this Act triggers the limitation period for the registration of liens and has no other purpose or effect. He suggested that this is the context in which the reference to substantial completion in the document must be interpreted: "They meant no more than that the building or part thereof had achieved or reached a certain degree of completion and that it or part thereof [was] therefore ready for occupancy."\* Given that this was its purpose, Mr. Keywan submitted, the fact he may have known that there were some leaks at the Algo Mall as of August 5, 1980, was not relevant, since it would be a servicing and maintenance issue.<sup>212</sup>

To the extent that the August 5, 1980, document was akin to a certificate of substantial completion, Mr. Larden did not see a problem with the fact that Mr. Keywan did not mention that he had not done a general review of construction before signature.<sup>213</sup> Mr. Larden also took issue with the suggestion that Mr. Keywan did not know much about the state of the building he had designed: "I wouldn't say that. I think there was communication with various members of the consulting team. As a matter of course he got certain reports. He indicated that he had been in touch with, if not Hirt, other people from that company." However, Mr. Larden was not able to point specifically to this evidence.<sup>214</sup> He referred to the good relationship Mr. Keywan had with the client and to the fact that Mr. Keywan qualified his assertion that the building was substantially complete by saying that it was "to the best of our knowledge."<sup>215</sup>

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\* Part 1, Written submission, James Keywan, pp. 46–7. Mr. Keywan cites the *Mechanics Lien Act*, RSO 1970, c 267, s 1(3), and *Bird Construction Co. v. Ownix Developments Ltd.*, [1980] OJ No 1183 (Div Ct), para 16. In addition, at p. 47 of his submission, Mr. Keywan indicates that the *Mechanics Lien Act* did not at that time contain any provisions with respect to the issuance of certificates of substantial performance or completion. Certificates of substantial performance were not created until the amendment to the *Mechanics Lien Act* in 1984, and so did not exist as a matter of law as of August 5, 1980.



Indeed, Mr. Larden placed a degree of emphasis on the qualifying language used by Mr. Keywan (and, by implication, Mr. Kadlec). He suggested that if Mr. Keywan had not qualified his assertion of substantial completion with the modifier that it was to the best of his knowledge, then signing the letter of August 5, 1980, would have been “a very inappropriate thing to do.”<sup>216</sup> Mr. Larden agreed that it was significant that Mr. Keywan attached his seal to the document and that the public would take this action as an indication that he had properly done his job. He further agreed that an architect would have understood that reliance would be placed on the statement in the letter that the Algo Centre was “substantially complete.” Again, Mr. Larden agreed that, without the qualifier that this was to the best of Mr. Keywan’s knowledge, it was a significant statement coming from an architect to say that a building has been designed substantially in accordance with the architectural design.<sup>217</sup>

Mr. Larden did not believe that Mr. Keywan had failed to fulfill his professional obligations in creating this letter, citing the limited nature of Mr. Keywan’s communications with Mr. Hirt. He did not agree with the suggestion that it was inappropriate to hide behind the qualifier that his assertion of substantial completion was only to the best of his knowledge. Mr. Larden pointed to the basis for the need for the letter, which was as a comfort letter for the municipality; it was to be used for “demonstrating substantial completion and the ability to grant an occupancy permit.”<sup>218</sup>

Mr. Larden did not think that Mr. Hirt should necessarily have signed this letter even if Mr. Keywan was relying on Mr. Hirt’s word that the building was substantially complete. Mr. Larden seemed to say that such a document needed to be signed by the designers, and Mr. Hirt was not one: “[O]ne would expect that the architect and engineer would be regarded as the designers of the building.”<sup>219</sup> This comment was confusing, in that it seemed to contrast with the assertion in Mr. Larden’s report that “[n]either the 1975 OBC nor the *Architects Act* definitively required an architect who had designed a building to perform general review of construction of that building.”<sup>220</sup>

Mr. Keywan’s retainer likely did not include responsibility for the design and approval of the waterproofing system installed at the Algo Mall. The evidence appears to support Mr. Keywan’s version of the facts that the owner, Algocen, alone took on the selection of the waterproofing system and worked closely with HSP during the installation and subsequent attempts to correct the deficiencies, with no input or assistance from him. Whether Mr. Keywan’s retainer included providing a general review as contemplated by section 2.4 of the OBC is not entirely clear and is made more complicated by the fact that Mr. Keywan did in fact sign and seal the August 5, 1980,<sup>221</sup> letter addressed to the Town of Elliot Lake’s Building Department.

What appears to be clear to me is that the *Building Code* required a general review at the conclusion of the project. As to who was responsible for that work, this function unfortunately was not as clearly defined in the relevant legislation (*Ontario Building Code*, *Professional Engineers Act*, and *Architects Act*) as it appears to be today. The fact remains that a certificate confirming that the construction of the Mall had been substantially completed in accordance with the architectural and engineering designs was signed, sealed, and submitted jointly by the architect and the engineer.

I agree with Mr. Larden that the August 5, 1980, letter was not a certificate of substantial completion as is now contemplated and defined by the *Construction Lien Act*. Such a document was not contemplated in the *Mechanics Lien Act* as it existed in 1979–80, as pointed out by Mr. Larden in his report. I am inclined to view the August 5, 1980, letter as an attempt to comply with the general review requirements of the *Ontario Building Code* of that time. Although the preparation, signing, and sealing of this document did not ultimately have a direct effect on the events that occurred more than 30 years later, it is nevertheless a further example of the somewhat casual manner in which the construction of the Algo Mall was undertaken.

Mr. Kadlec confirmed that the August 5, 1980, letter certified that, in his opinion as a professional engineer and based on the reports from the testing company retained at the time (Trow), the building had been constructed substantially in accordance with the structural design. Mr. Kadlec appeared to be of the view that this letter responded to the general review requirements outlined in the OBC, contrary to Mr. Keywan's evidence.<sup>222</sup>

I admit being troubled by the apparent efforts of Mr. Keywan and Mr. Larden to circumscribe the function and importance of the August 5, 1980, letter. Placing a professional seal on a document lends more than symbolic weight to the statement on which it is affixed. Mr. Keywan and Mr. Larden appear to advance the proposition that the words "to the best of our knowledge" absolve the declarants from any form of personal responsibility; they would render the statement essentially devoid of meaning and significance. They would make reliance risky at best. Surely, it was intended and expected that the description of Mr. Keywan as an architect, the presence of his seal and signature, the assertion of substantial completion, the intended recipient, and the statement of conformity with design at the very least implied some form of direct knowledge and meaningful attestation. I am left with the feeling that their explanation is facile and self-serving and appears to be made for defensive purposes, rather than being a reflection of practice current at the time it was made.

I am inclined to the view that it is more likely than not that the intent of the parties at the time the document was submitted was that it be taken, if not as a general review letter of the type required by section 2.4 of the *Ontario Building Code* and as required by section 8(4) of the *Elliot Lake Building By-law No. 78-47*, then at least as a general assurance of quality. Indeed, Mr. Keywan agreed that the certificate would be relied on as confirming that the building was complete and compliant with the *Building Code*.<sup>223</sup>

I feel that I am asked to stretch credulity by believing that this document was nothing more than a "comfort letter" based largely on a belief that the owner would not pay for something improperly executed. Surely the intent of practice and legislation as it existed at the time was predicated on objective and unbiased certification of adherence to standards and not on a mere professional parroting of the owner's expression of satisfaction.

**I am inclined to view the August 5, 1980, letter as an attempt to comply with the general review requirements of the *Ontario Building Code* of that time. Although the preparation, signing, and sealing of this document did not ultimately have a direct effect on the events that occurred more than 30 years later, it is nevertheless a further example of the somewhat casual manner in which the construction of the Algo Mall was undertaken.**

## **The load-carrying capacity of the hollow core slabs at the Algo Mall was a source of confusion**

### **There was confusion about this issue during the life of the Mall and in the evidence before the Commission**

The real and perceived load capacity of the actual slabs installed at the Algo Centre was a key issue throughout this Inquiry. It is important, therefore, to understand the exact load capacity of the hollow core slabs at the Mall. Although NORR did not find that the collapse of the roof was the result of a failed hollow core slab,<sup>224</sup> the question of the actual capacity of these slabs to take load (i.e., weight) was an ongoing issue throughout the life of the Mall. As numerous owners, engineers, and advisers sought explanations for the continuing leaks at the Mall and ways to resolve them, the issue regularly arose as to the roof's ability to safely receive the weight of a new waterproofing system.

### **The design of the Mall called for a roof deck capacity to support 120 psf**

Hollow core slabs for any structure are designed to withstand the live and dead loads as specified in the contract documents.\* All the hollow core slabs installed at the Algo Mall were to have been designed to carry a superimposed load of 120 psf with one exception, the slabs installed to form the rooftop parking immediately adjacent to the perimeter of the Hotel. The drawings called for these slabs to carry a superimposed load of 130 psf to account for the added weight of snow piling against the wall due to drifts and accumulation.<sup>225</sup>

Mr. Kadlec's structural drawings and Coreslab's shop drawings both called for 8-inch hollow core slabs that were to achieve a superimposed load of 120 psf without a composite topping. They did not show a higher load capacity requirement for the slabs adjacent to the Hotel.

### **NORR concluded that the core slabs called for on the lower floors could not have met the required design capacity of 120 psf**

In its report and during the testimony of its panel, NORR was of the view that the 8-inch hollow core slabs installed at the Mall could not have met the superimposed load required in the drawings. NORR referred to what it understood to be the appropriate load chart for the time frame of the construction of the building. This load chart was originally produced by Coreslab and dated back to the time of construction, entitled "Coreslab 8" Imperial Load Table."<sup>226</sup> This chart indicated to NORR that the available load capacity for a slab of the size in question (8 inches thick, 31 feet long) was 87 psf. In essence, what NORR suggested in its report and testimony was that the building's engineer asked the impossible of the hollow core manufacturer (given the load chart for Coreslab's product) by requesting an 8-inch-thick hollow core slab with the capacity to bear 120 psf of superimposed load. NORR also suggested that the manufacturers of the hollow core slab had a duty to indicate to those designing the Algo Centre that hollow core slabs of the specified size could not be manufactured to achieve the required load capacity.<sup>227</sup>

Using the load chart described above, NORR determined that the core slabs installed at the upper level of the Mall (i.e., the floor of the second floor and the ceiling of the ground floor) were overloaded by 38 percent relative to the specified load (87 psf actual allowable load vs. 120 psf as the load specified in the engineering drawings).<sup>228</sup> NORR believed that these slabs were overloaded because no composite topping was required or installed on the hollow core slabs that made up the interior floors of the Algo Mall.<sup>229</sup>

### **NORR concluded that roof deck satisfied the load requirement because of the bonded concrete topping**

NORR's engineers concluded, however, that the slabs for the parking level satisfied the load requirement of 120 psf because they were covered with a bonded concrete topping that added to the strength of the system.<sup>230</sup>

The question of the load capacity of the hollow core slabs was at times complicated and, as would become apparent during the evidence presented at the Inquiry, a source of great confusion for the various owners of the Algo Mall during its lifetime.

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\* The contract document is any document that sets out the terms and conditions of the agreement between the parties to the contract. In the context of a construction project, it also includes the plans and specifications.



### **Coreslab representative Doug Harman's views on the actual capacity of the slabs installed at the Algo Mall**

Doug Harman is the vice-president and general manager of Coreslab. When he gave his evidence, he was unclear on the capacity of the hollow core slabs installed at the Algo Mall. In fairness, he is not an engineer. At best, he tended to support NORR's view that, based on the load charts, the slabs used at the Mall were undercapacity.<sup>231</sup>

### **Coreslab's chief engineer testified that the roof deck had the capacity to support 120 psf without the concrete topping**

Ms. Saari, Coreslab's chief engineer, was specifically called to testify on the load capacity of the hollow core slabs installed at the Mall. Before her testimony, the Commission heard evidence that, during the life of the Mall, qualified people, including professional engineers and representatives of Coreslab, believed and concluded that the hollow core slabs installed were capable of achieving the maximum superimposed load capacity of 120 psf only with the assistance of a properly bonded composite topping. The Coreslab load tables used at the time the slabs were installed put their capacity for superimposed loading at 87 psf, and the remaining 33 psf were made up by the addition of a composite topping to the slabs.<sup>232</sup>

Ms. Saari started working at Coreslab in 2007 and received her professional engineering licence the following year. From 2007 to January 2010, as a plant engineer, she carried out design calculations for different projects.<sup>233</sup>

She provided two reports to the Commission, one dated May 3, 2013,<sup>234</sup> and a second in the form of an appendix<sup>235</sup> to that report. During the process of writing these two reports, she consulted the structural drawings for the Algo Mall and the Coreslab shop drawings.<sup>236</sup>

The original documents included drawing S4, one of the structural drawings by Mr. Kadlec.<sup>237</sup> The drawing provided details showing a layer of insulation between the topping and the slabs. Ms. Saari interpreted the location of the insulation as meaning that the intent of the design was that there would not be a bonded topping.<sup>238</sup> Ms. Saari testified that, according to the documents she reviewed, it did not appear that the installation of a composite topping on the hollow core slabs was part of the engineer's original intent. She understood that the composite topping was subsequently applied because it was somehow part of the HSP waterproofing system.<sup>239</sup>

She explained that the Coreslab load tables, which were referenced and relied on by the various professionals who had been retained to inspect the Mall to determine the load capacity of the slabs, are merely sales documents for business owners and architects to help building designers choose the required form of hollow core slab. She testified that the tables have "quite a level of safety built into the table" and are a "quick way to understand how much loading you can actually achieve with a different thickness of slab."<sup>240</sup> She explained that the load charts are conservative in their estimates for reasons of safety and to meet the requirements of various jurisdictions with different load requirements.<sup>241</sup> As well, it was general knowledge among the engineers at Coreslab (since the company started) that the load charts provide a conservative value but that the slabs can support greater weight. Ms. Saari said that, if the load charts were really the end of the line in terms of determining capacity, "then I wouldn't really have a job." The slabs are an "engineered product" that can be modified in many ways; for example, by taking away some of the hollows and making them solid: "It's a completely tailor-made situation that can be achieved if the load table is not sufficient."<sup>242</sup>

Ms. Saari testified that although the load charts for Coreslab's product indicated that a slab of the size used at the Mall could take only 87 psf, the actual capacity of the slabs used at the Mall were 120 psf, without a bonded topping. Ms. Saari based her conclusions on calculations she performed using a slab with a differently shaped hollow core from the one shown in the load chart that NORR referred to.<sup>243</sup> She determined, based on her review of the photographs of the Mall following the collapse,<sup>244</sup> that the geometry and spacing of the cores used at the Mall were different from the geometry and spacing of the cores represented on the load table used by NORR.<sup>245</sup> She located and produced for the Commission a load chart for the type of hollow core slab used during Mall construction.<sup>246</sup> That chart still indicated on its face that the specified load for a 31-foot, 8-inch-deep slab was 87 psf, the same as for the type of core slab considered by NORR.

Ms. Saari indicated that this information allowed her to conclude, first, that the slabs, because of the geometrical shape of the interior hollow, were actually stronger than the ones shown in the load chart referred to by NORR. Secondly, the information on the load chart allowed Ms. Saari to calculate that the slabs installed achieved the specified capacity of 120 psf – without adding a bonded topping, and without a reduction of any safety factors built into the product.<sup>247</sup>

Although Ms. Saari was able to reach these conclusions, she could not explain why Ed Karaluk and Shahid Shaikh, former engineers with Coreslab, were unable to reach these same conclusions when the various owners asked them about the capacity of the hollow core slabs. She could only speculate on reasons why.<sup>248</sup>

The sum total of Ms. Saari's analysis was:

While the tabulated values in the published load table ... are exceeded, the precise computer analysis shows that the slabs were indeed *not overcapacity* and *did not require the topping to act compositely* to achieve the required strength and serviceability characteristics.<sup>249</sup> [Emphasis in original.]

It was her further opinion that, based on her calculations, a waterproofing membrane and 3 inches of asphalt could have been supported directly on the hollow core slabs after removal of the concrete topping.<sup>250</sup> In particular, she suggested that with a properly bonded topping and a building that was otherwise in good condition, she would have no problem recommending the addition of a 20 psf waterproofing system.<sup>251</sup>

NORR was skeptical of the ability of the hollow core slab to meet the project specification without a composite topping, and in particular that there would be a such a large discrepancy between the starting point listed in the load chart of 87 psf and the actual capacity of the slab, as attested to by Ms. Saari, of 120 psf.<sup>252</sup> I share NORR's skepticism and am not prepared to accept that the hollow core slabs installed at the Algo Mall had a load capacity of 120 psf without the addition of the composite topping.

In cross-examination by counsel for Coreslab, NORR's Dr. Saffarini was given the opportunity to comment on Ms. Saari's calculations and conclusions. He indicated that he had made some calculations of his own (these calculations were not entered into evidence or provided to the Commission) and indicated that "even by using more of the modern codes and the latest codes, [I] would find that we would not be able to meet that [120 psf without a bonded topping]."<sup>253</sup>

Ms. Saari's evidence was given relatively late in the proceedings before me. As a result, others (such as NORR) who testified were unable to comment formally on it. In addition, I am conscious that she represents a position which, at least from the perspective of appearances, is not disinterested: it does not emanate from a totally neutral third party. Consequently, although her opinion appears sound and well reasoned, I choose not to adopt it as definitive and leave to others the difficult task of critically evaluating it. Ultimately, the slabs did not fail, and the purpose of this rather extensive discussion is to evaluate the behaviour of others in relation to their perspective on the capacity of the Algo Mall roof. I do find it likely that the hollow core slabs were capable of supporting the

design load of 120 psf with a properly bonded topping. Thus, it would have been sufficiently strong to support a membrane and an asphalt wearing course that weighed approximately 20 psf. This conclusion was also arrived at by a number of the other professionals who had inspected the Mall during its 30-year lifespan, including Trow, Alex Tobias, and Halsall. Their evidence is addressed later in the Report.

I emphasize that, in arriving at this conclusion, I am speaking only of the capacity of the roof as designed. I am not indicating that the roof deck of the Algo Mall, having endured constant saturation of salt-laden water since its construction, would have been able to support any further load. As the NORR report and NORR testimony have indicated, that saturation caused significant corrosion of the connections between the members of the steel-support system and the core slabs themselves and caused the concrete topping to debond in various areas, no doubt affecting the load-carrying capacity of the slabs. Its structural capacity was significantly affected as a result.

As I will explain below, the engineers who were asked to provide analysis of the ability of the roof to support a waterproofing system consistently failed to consider the effect of the leaks on the structural capacity of the building. They consistently considered only the capacity of the building as designed, assuming that that capacity had not been affected over time. The only exception to this pattern occurred when Mr. Wood was asked to perform inspections in 2009 and 2012. I will have more to say about his inspections later in this Report.

## The Town of Elliot Lake and the construction of the Algo Mall

### **The chief building official and the Building Department enforce Ontario Building Code requirements**

The chief building official (CBO) and the members of a municipality's building department play an important role during the construction of any building. In some municipalities, these individuals continue to play an important role enforcing property standards throughout the life of the building. The Commission heard from two witnesses from Elliot Lake's Building Department who were able to explain their understanding of the role of the CBO in Elliot Lake and how the department typically became involved during the construction of a building.

Roger Pigeau became the chief building official for the Town of Elliot Lake on August 4 or 5, 1980,<sup>254</sup> and held the position until November 1999.<sup>255</sup> Mr. Pigeau was not the CBO for the Town of Elliot Lake at the time the Mall was constructed; Robert Gruhl held that position. Mr. Gruhl died before Mr. Pigeau assumed the position and before the completion of the Mall. Mr. Pigeau obtained a diploma in civil engineering technology from Cambrian College in Sudbury. He worked first for a consulting firm in North Bay for five years, followed by 10 years as a building inspector for the City of North Bay. He then moved to Elliot Lake to take on the position of chief building official<sup>256</sup> – almost at the exact time the certificate of substantial completion was issued (August 5, 1980).

Paul Officer also testified about the role of Elliot Lake's Building Department during the construction of a building. Mr. Officer joined the Building Department as a building inspector on September 21, 1981, after the completion of the Mall. He was 21 years old and would eventually become Elliot Lake's fire chief, a position he held at the time of the roof collapse.<sup>257</sup> Before starting with the municipality, Mr. Officer graduated from Fanshawe College in London, Ontario, with a certificate in construction supervision and worked for the City of Guelph's Building Department.<sup>258</sup> Mr. Officer remained a building inspector for Elliot Lake until November 1999 and then held the position of acting chief building official for a period following Mr. Pigeau's retirement.<sup>259</sup>

Mr. Pigeau explained that his department had two major functions during construction: the approval of the architectural plans before construction, and inspections throughout the construction process.<sup>260</sup>



What follows is a general description of how the Elliot Lake Building Department generally carried out its functions in relation to new construction in Elliot Lake. The different stages of inspections conducted by a City inspector during construction were identified as:

- before the pouring – inspection of the footing and foundation;
- when walls are being poured;
- plumbing inspection(s);
- structural steel once it is substantially complete;
- when the building is enclosed and insulation installed; and
- before substantial completion.

Mr. Officer testified that he would have expected about a dozen inspections for the Algo Centre, if not more, given that the Hotel portion was almost like a second building and would have required more attention.<sup>261</sup>

According to Mr. Pigeau, the chief building official and building inspectors deal primarily with the owner throughout the construction process, although they may also deal with the general contractor.<sup>262</sup> Mr. Pigeau seemed to downplay the importance of inspections by the Town's / City's Building Department. Although his department carried out intermittent inspections for commercial buildings during the construction phase, it relied extensively on the architect to ensure compliance with the Ontario *Building Code*. "We would intermittently do inspections," he explained, "but basically the responsibility had to be borne solely by the design architect."<sup>263</sup> Before occupancy, the department would require certificates from the engineer and the architect indicating that the building conformed to the original, approved design. Once these certificates were received, an occupancy permit would be issued.<sup>264</sup>

In conjunction with the Ontario *Building Code*, the Elliot Lake chief building official was responsible for enforcing Elliot Lake's Building By-law, By-law No. 78-47, "[b]eing a by-law to provide for a revised Building By-law for the Town of Elliot Lake."<sup>265</sup> This by-law was in place before construction started at the Algo Centre and remained in force throughout Mr. Pigeau's time as CBO.<sup>266</sup>

The Building By-law set out numerous requirements related to the construction and renovation of a building such as the Algo Centre, including a requirement for a building permit "[w]hen a building or any part thereof is altered."<sup>267</sup> In addition:

- Section 5.1 required the owner of a building to give certain information to the chief building official before beginning work on a building, including the name, address, and telephone number of the contractor or other person in charge of the work, the engineer and/or architect reviewing the work, and any inspection or testing agency engaged to monitor the work.<sup>268</sup>
- Section 5(4) stipulated that, even with the granting of a permit and approval of drawings and specification, the owner and/or contractor was still obligated to comply with the Ontario *Building Code*.<sup>269</sup>
- Section 7(1)(a) was a general section giving the chief building official the power to order that a person contravening the by-law comply.<sup>270</sup>
- Sections 7(2)(b) and (c) were provisions allowing the chief building official to establish that all requirements of the by-law had been complied with both before construction began and on completion of the work.<sup>271</sup>
- Section 8(4) required an architect or engineer to undertake a review during construction and submit the report to the chief building official.<sup>272</sup> This section corresponds to section 2.4(b) of the Ontario *Building Code* at the time, which required that a building designed by an architect or engineer be reviewed by an architect or engineer during construction.<sup>273</sup>

- Section 9(1)(a)(vi) stated that a permit was required for “all alterations, renewals and repairs of roof timbers, together with repairs, alterations, additions and renewals of flashings, and roof drainage ...”<sup>274</sup>
- Section 10(1) allowed the town to require site plan approval for a major project. Section 10(6) detailed what those plans must include. Section 10(6)(c) required “larger scale details” in respect of “waterproofing.”<sup>275</sup>
- Section 11(1), subsections (a) to (g), required that the constructor notify the chief building official two working days before seven different stages of construction, all calling for inspections. These stages included the commencement of construction; commencement of footing; substantial completion of footings and foundations, etc.; covering of the septic tank and any subsurface sewage disposal system; and substantial completion of structural framing, insulation, vapour barriers, building drains, etc.<sup>276</sup> Similar obligations on owners are reflected in section 2.10 of the Ontario *Building Code* in place at the time.<sup>277</sup>
- Section 11(4) required that the owner notify the chief building official, as of the date of completion, of the completion and the availability of “as constructed” drawings.<sup>278</sup>

### **The extent of the town’s involvement in the construction of the Algo Mall is unclear, but it is obvious that the Building Department was not fully staffed**

The Commission heard little oral evidence to explain what was occurring in the Building Department before, and during, the construction of the Algo Centre. All the City employees who would have been involved with inspections and drawing reviews during the construction either did not have a sufficient recollection of the material events from that time period or have passed away.

Mr. Gruhl was Mr. Pigeau’s predecessor, but the Commission learned very little about him. There seem to have been periods, corresponding with important events in the construction of the Algo Centre, where the Town of Elliot Lake did not appear to have a chief building official.

The Commission learned that Mr. Gruhl stopped working for the town on July 20, 1979, because of illness. He returned on December 3, 1979, but left again on February 14, 1980. He died on May 5, 1980.<sup>279</sup> For most of the time the Algo Centre was under construction, Mr. Gruhl was not working. An individual named Frank Hollick appears to have filled the gap, along, perhaps, with a Mr. Marseille, a plumbing inspector with the town.<sup>280</sup> There is no indication that either of these men filled in as interim chief building official during Mr. Gruhl’s absences or if either one had the requisite knowledge and experience to fulfill such a role. It would appear that during the construction of the Algo Mall, the Town of Elliot Lake had no chief building official for 11 months (although not consecutive), three of which were at the end of construction, when the Mall was reaching its completion.

Mr. Hollick was an Elliot Lake building inspector. He left the employ of the town a short time after Mr. Pigeau’s appointment as CBO in August 1980.<sup>281</sup>

At the time of the Mall’s construction, Mike Perkins, a civil engineer, acted as the town engineer. He continued to work for Elliot Lake during a portion of Mr. Pigeau’s tenure.<sup>282</sup> Mr. Pigeau indicated that Mr. Perkins’s work did not relate to building construction. He would have dealt with things such as service connections, sewer and water, and municipal infrastructure issues generally. Mr. Perkins did not normally deal with building projects unless they involved the town’s infrastructure.<sup>283</sup>

Mr. Hollick and Mr. Perkins have also died, so the Commission did not have the benefit of their testimony. The evidence received seemed to indicate that the Building Department was in a state of transition and seemingly understaffed and/or underqualified at the time the Algo Centre was being constructed.

The Commission did hear from Larry Burling, who was deputy clerk for the Town of Elliot Lake in 1978–9. Mr. Burling could provide little insight into the workings of the Building Department and its involvement with the Algo Centre. He did say, however, that “the municipality was trying to expedite the development of the Mall, you know it was a very significant development in the community. And we were trying to make life as easy as we could but still do what we needed to do.”<sup>284</sup>

### The documentary evidence of the town’s involvement during construction

In addition to the paucity of witnesses able to speak to the town’s role during construction of the Mall, the

Commission saw only a few documents on the subject. Those documents did allow the Commission to piece together some aspects of the town’s involvement during the construction but not the full extent of it.

**What evidence there is indicates that preliminary building permits were issued for the Algo Centre without the town building officials first having reviewed the detailed architectural and structural plans.**

#### The building permit was issued without complete drawings

What evidence there is indicates that preliminary building permits were issued for the Algo Centre without the town building officials first having reviewed the detailed architectural and structural plans.<sup>285</sup> In fact, it is unclear whether the town ever received detailed architectural and structural plans for the Algo Centre.

Given that none of the inspectors from the time of the original construction were available to testify, or if available did not have sufficient recollection of the material events from that time, it was difficult to determine which drawings had been submitted to the Town of Elliot Lake at the permit application stage and during construction. The town did receive some of the drawings. These drawings were included in the documents received from the City of Elliot Lake, although the timing of their receipt by the town is unknown. The drawings that were contained in the files of the City of Elliot Lake included the following:

- some of the shop drawings prepared by York Steel, although not the complete set;
- some of the structural steel drawings that had been prepared by Beta Engineering and Mr. Kadlec, in particular drawing S4;
- some of the shop drawings prepared by Coreslab, although not the complete set;
- the roof-parking and framing plan, which was contained in the set of architectural and structural drawings that had been prepared for the construction of the Mall, along with several of the other architectural drawings prepared for the project, including drawing A3 (“Floor Plan – Upper Mall Level”) and drawing A8 (“Sections 1, 2, 3”); and
- drawings for miscellaneous mechanical supports and enclosures.

Mr. Kadlec testified that the design he produced, which he believed was part of the drawings submitted to the City, complied with the 1975 Ontario *Building Code*. According to Mr. Kadlec, this compliance with the Code meant that the chief building official did not have the discretion to refuse to issue a building permit.<sup>286</sup> Mr. Kadlec was 100 percent certain that, during his time on the Algo Centre project, he was never provided with an inspection report from the Building Department.<sup>287</sup>

It is unknown whether the Town of Elliot Lake ever received a complete set of architectural and structural drawings, together with the relevant shop drawings. Mr. Officer suggested that if the drawings had existed in the City file, it was possible they had been destroyed or lost over time as a result of renovations, moves, and the general deterioration of paper.<sup>288</sup>



A building permit for the Algo Centre (referred to on the permit as “Ontario Avenue Shopping Mall”) was issued on April 27, 1979 (Building Permit 247-79).<sup>289</sup> Almost two months later, on June 19, 1979, Mr. Gruhl wrote to Mr. Hirt, stating: “This Department requires drawings (as they are completed by the Architect / Engineers) as was previously agreed upon.”<sup>290</sup> There is no evidence of whether the drawings were ever provided to Mr. Gruhl.

An internal town document produced by the City of Elliot Lake dated January 8, 1980,<sup>291</sup> referred to the June 19, 1979, letter from Mr. Gruhl and stated that the “Building and plumbing permits for the Algo Centre were issued without completed drawings, in order to not delay construction. (Building By-law 78-47, Section 7, Articles (4) & (5).” Mr. Pigeau thought Mr. Gruhl must have prepared this document. He did not have any knowledge that Mr. Gruhl was directed to issue these partial permits despite the absence of drawings, and he could not say whether Algocen Realty ever made a complete building permit application for the Algo Centre.<sup>292</sup>

Building Permit 247-79,<sup>293</sup> issued on April 27, 1979, to allow construction of the Mall, had boxes to be checked off after the words “ATTACHED INFORMATION,” including ones for “Plot Plan,” “Drawings,” “Specifications,” and “Other.” None of these was checked off.

I conclude that the initial building permit was issued based on no or incomplete drawings.

### Some inspections were carried out

The Commission obtained copies of some of the inspections carried out during the construction of the Mall. The inspection reports that were entered into evidence included, but were not limited to, the structural steel, the hollow core slabs, one or more of the beam connections, the pours for the concrete topping on the rooftop parking, and fireproofing.<sup>294</sup>

Mr. Pigeau testified that it would be advantageous for a set of as-built drawings to be filed with the Building Department to distinguish the actual, final construction of a building from the original design plans. He did not recall ever being provided with such a copy. The Commission never received a set of as-built drawings in response to the summonses to produce sent out to the various parties.

On August 5, 1980, the certificate of substantial completion was signed by Mr. Keywan and Mr. Kadlec and submitted to the officials at the Elliot Lake Building Department. Mr. Keywan agreed that this document was to be relied on by the City as confirmation that the building was substantially complete and compliant with the Ontario *Building Code*.<sup>295</sup> He never spoke with any of the town inspectors during the construction of the Mall.<sup>296</sup>

I am not able to determine clearly whether an all-encompassing, final inspection was carried out at the Algo Centre by an inspector with the Town of Elliot Lake. The documentary evidence as set out above seems to indicate that the inspections were intermittent; however, it is not known whether a complete record of the inspections conducted by the Building Department was provided to the Commission. It would appear to be more than likely that the building officials with the Town of Elliot Lake relied on the contents of the certificate of substantial completion to satisfy them that the construction was completed in accordance with the design and, by extension, in accordance with the Ontario *Building Code*.

**I am not able to determine clearly whether an all-encompassing, final inspection was carried out at the Algo Centre by an inspector with the Town of Elliot Lake. The documentary evidence as set out above seems to indicate that the inspections were intermittent; however, it is not known whether a complete record of the inspections conducted by the Building Department was provided to the Commission.**

Mr. Pigeau indicated that he was not certain whether he saw the certificate of substantial completion signed by Mr. Keywan and Mr. Kadlec. It was addressed to Mr. Hollick, and Mr. Pigeau could say only that he must have eventually seen it.<sup>297</sup> Mr. Pigeau never took steps to independently verify the veracity or accuracy of the certificate of substantial completion. He said his department did not conduct final inspections, because they were not engineers and not qualified: “[I]t’s very difficult to ask for an inspector to do a final inspection, because these are all things that far exceed their education and capabilities.” Furthermore, he was not aware that a third party consultant or a municipal building official ever did a final inspection.<sup>298</sup>

In addition to issuing building permits and conducting inspections throughout the construction process, Elliot Lake’s chief building official also had the power to issue the occupancy permits required under the Ontario *Building Code* for tenants of the Mall and for the Mall generally.<sup>299</sup>

Occupancy permits were issued for Shoppers Drug Mart and Woolco on May 22, 1980. Both appear to have been signed by Mr. Perkins, the town’s engineer.<sup>300</sup> Mr. Pigeau indicated that, at this point, Mr. Perkins must have been taking care of occupancy permits. Mr. Pigeau assumed that Mr. Perkins had been appointed by by-law as an authorized signing authority. Once Mr. Pigeau came onboard as the chief building official, in August 1980, Mr. Perkins had no role or jurisdiction within the Building Department.<sup>301</sup>

Mr. Pigeau agreed that it would have been advisable for an occupancy permit to be issued for the Algo Centre itself (i.e., for the common areas within the Mall), but he was not aware if one had been requested or granted.<sup>302</sup>

It is not known if Mr. Gruhl or any of the other inspectors had issued at any time during the construction of the Algo Centre orders to comply, stop-work orders, orders not to cover or orders to uncover under the Ontario *Building Code*,<sup>303</sup> or an order to comply pursuant to section 7(1)(a) of the town’s Building By-law.<sup>304</sup> Owing to the passage of time and the unavailability of witnesses, the Commission was also not able to confirm if

- a request had been made to Algocen to provide contractor and engineer / architect information before the start of construction;<sup>305</sup>
- sections 7(2)(b) and (c) of the Building By-law were enforced to establish prior to the start of construction that all requirements of the by-law had been complied with, and to verify on completion of the work that all such requirements have been complied with;<sup>306</sup> and
- any documents indicating that the general review contemplated by section 8(4) of the Elliot Lake Building By-law and section 2.4(b) of the Ontario *Building Code* had been carried out and a report provided to the chief building official.\*

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\* Pigeau testimony, March 25, 2013, pp. 2717–8. Mr. Larden said that general review reports of this nature would not normally be filed with the chief building official during this time frame. He recalled that the Ontario Building Officials Association wanted to see these field review reports and that, after this issue was debated, reports of this nature began being shared as a matter of course. Municipalities would ask for them and have designers sign commitments to submit these documents. Again, though, this procedure was not followed as a matter of course in the late 1970s: Larden testimony, July 30, 2013, pp. 19150–1.

## The Harry S. Peterson (HSP) Waterproofing System – its design and installation

### HSP developed a parking deck waterproofing system with “control joints” and “strip membranes”

Owing to the passage of time, many witnesses involved in the design and construction of the Algo Centre were not available to testify before the Commission. The Commission was, however, able to locate David Monroe, who was living in Pittsburgh, Pennsylvania, at the time of his testimony. Mr. Monroe was under no legal obligation to attend before the Commission. He attended of his own accord and provided valuable information on the waterproofing system installed by his former employer, HSP Company. He was heavily involved in managing that installation process.

Mr. Monroe is currently retired. He graduated from Michigan State University with a bachelor's degree in science and a master of business administration. He is not an engineer.<sup>307</sup> He joined HSP as a full-time employee about 1971, originally working in sales and product management. He stayed with the company until 1992, by which time he had become the company's vice-president.<sup>308</sup>

HSP Inc. (referred to on its paperwork as the HSP Company) was a US corporation wholly owned at the relevant time by three brothers, one who was president and the other two vice-presidents. Their father, Harry S. Peterson, founded the firm. The company conducted its Canadian business under the name of Harry S. Peterson Co. of Canada, a partnership registered in the Province of Alberta.

Mr. Monroe explained the genesis of HSP's involvement as the lead contractor for the waterproofing of the roof deck parking structure at the Algo Mall. The system applied was known within the roofing / parking business of that era as the “Peterson system.”<sup>309</sup> However, a new variation of this system would eventually be installed in Elliot Lake.

HSP's primary business was the provision of waterproofing systems.<sup>310</sup> In this sense, the company was a specialty contractor. During his 20 years with the firm, Mr. Monroe was probably involved in a thousand or more projects, all involving parking garages.<sup>311</sup>

When Mr. Monroe started with the company, in 1971, one of the Peterson brothers was a chemical engineer involved in the development of polyurethane waterproofing materials and sealants in particular. The company began to integrate the two functions of waterproofing and sealants.<sup>312</sup> At the same time, the pre-stressed concrete industry was growing and actively marketing its products for parking construction. HSP joined this field, since its expertise in sealing and waterproofing addressed some of the leakage problems the pre-stressed concrete industry was experiencing.<sup>313</sup>

When HSP first became involved in parking-related projects, the precast concrete members used in those projects to support the deck were called Double Tees, a name derived from the T shape of the members. They were 60 feet in length and initially 8 feet wide (although today they may be as wide as 14 or 15 feet). These Double Tees were produced off-site, brought in finished condition to the construction location, and erected to make the parking structure. As part of the finishing process, a concrete slab would be poured on top of these



members to create the parking deck. Mr. Monroe described the following problem with cracking which would arise after the installation of the concrete Double Tees and the topping:

[B]ecause of the nature of these precast pieces being segmental and fastened together, they would flex under traffic, road and movement and so forth ... we observed that there tended to be a crack [which] would develop in the concrete toppings and the crack would leak.<sup>314</sup>

This problem led to concerns about the steel elements underneath and issues of corrosion.<sup>315</sup>

HSP observed while working on these projects that the cracks above the Double Tees were occurring in a predictable way, namely, at every place in the concrete topping which corresponded with the joint created where two Double Tees met. This observation led to the invention of the Peterson Crack Control System, which essentially involved pre-cracking the concrete topping at the joints where the Double Tees met. As Mr. Monroe described it, the process was to pre-crack at the location of these joints: "[W]e could pre-crack it, if you will, in a controlled manner and provide a crack control system that could be sealed and effectively maintained that way."<sup>316</sup> HSP began to do exactly that. According to Mr. Monroe, this procedure turned out to be highly effective for dealing with leakage issues and caught on in the precast concrete industry. That industry "welcomed HSP's involvement because they took on responsibility for dealing with the problem."<sup>317</sup> The system was called the Peterson system because "it was so widespread it was like Kleenex, it became generic."<sup>318</sup>

Mr. Monroe agreed that in 1979–80, HSP had an excellent reputation. He thought it fair that Algocen looked to the company at the time as the experts in this field.<sup>319</sup>

The general process for applying the Peterson system was that someone other than HSP would create the "crack," or "control joint," by tooling the joints above where the underlying Double Tees met. HSP's involvement was then limited to sealing the joints and applying a surface sealer over the rest of the surface of the concrete topping. In addition, HSP had applications it would sell for the expansion joints in a building.<sup>320</sup> The product used to seal the crack control joints was called Iso-Flex, an elastomeric compound.<sup>321</sup>

One of HSP's well-known projects in Canada was on the Terminal 2 parking structure at Toronto Pearson International Airport. HSP worked with a consultant who designed a high-quality, durable concrete to be used for the entire concrete surface of the parking deck. The concrete was tough to create – dry and stiff – and difficult to place. The result, though, when combined with Peterson's crack-control system, was a "very good deck," which won awards in the precast industry and from the American Concrete Institute. At the time, the Terminal 2 parking structure was the largest precast parking structure in the world.<sup>322</sup> It was constructed with Double Tees, not hollow core slabs. Significantly larger than hollow core slabs, the Double Tees range from 8 to 12 feet in width and are 42 inches in depth and as long as 60 feet. Hollow core slabs, in comparison, were at most 30 to 31 feet long, 4 feet wide, and 8 to 12 inches deep. Double Tees cover more surface space, creating fewer joints and fewer potential points for cracking.<sup>323</sup>

The Pearson project involved a regular, stand-alone parking garage. The Algo Mall was an exposed parking garage over occupied retail space. At the Pearson project, no protection was placed between the joints of the Double Tees (i.e., below the concrete topping, at the points where the Double Tees met).<sup>324</sup>

The Pearson project attracted a lot of publicity and requests for similar applications throughout North America. Recognizing the importance of the high-quality concrete to the overall system, HSP entered a long-term alliance with Diplock, the concrete company it had worked with on the Pearson project, and with Canadian Barrier, which provided the surface sealer.<sup>325</sup> Over time, HSP began to have complete confidence in Diplock,<sup>326</sup> the company that would install the concrete for the parking deck at the Algo Mall.

The Peterson system continued to evolve before its use in Elliot Lake. The company worked on a parking structure at Casa Loma in Toronto. This, too, was a precast parking structure using Double Tee decking. In addition to the sealant in the crack-control joints and the surface sealant over the whole of the concrete topping, the Casa Loma job involved the application of a strip membrane along the joints of the Double Tees. HSP had begun to notice that cracks in the concrete of its decks at Pearson and at other projects were leading to leakage at the joints, and that cracks in the concrete topping led to ruptures in the membrane in those areas. It was thought that benefits would result from switching to a strip membrane. This change led to cost savings from not having to apply as much membrane; and the use of a strip membrane, located at the critical area for leaks, allowed for the rest of the surface between the precast below and the concrete slab above to be bonded. It also had the advantage of creating composite action and consequent greater roof-load capacity, presumably for lesser cost.<sup>327</sup>

HSP felt the use of the strip-membrane system would make it easier to monitor and find leaks. Using the strip-membrane system, with the pre-cracked joint located above the application, meant in theory that the leaks would be concentrated at that location. The fact that the rest of the roof would be bonded meant that when water did make it through along those joints, it would not be able to migrate laterally but would have to remain somewhere along the immediate area of a joint.<sup>328</sup> The water would not be able to travel between the concrete topping and the precast concrete below, because those two surfaces were sealed together and, presumably, watertight.

Mr. Monroe described the various lines of defence against water and chloride infiltration for the strip-membrane system. First, there was the sealant on top of the concrete, combined with the Iso-Flex sealant at the crack-control joints. The second line of defence was the strip membrane one level down, just above the grouting, immediately below the crack-control joints.<sup>329</sup>

Casa Loma's waterproofing system was installed using the strip membranes (as described above) as an experiment. The system installed at Casa Loma was not installed at the Algo Mall. Casa Loma, like Terminal 2 at Pearson, used the Double Tees and was simply a parking garage with no retail or living space beneath it. It was the first project to use the Peterson crack-control system combined with a strip-membrane system.<sup>330</sup>

## **HSP proposes to install its Peterson system on hollow core slabs despite having never used the system on a design similar to the Algo Mall**

HSP monitored the system at Casa Loma for two to three years and observed no leakage. At about that time, Mr. Monroe was asked to attend a meeting about the Algo Mall project. He specifically recalled working with Mr. Hirt and Mr. Pinnell from Algocen. At that time, according to Mr. Monroe, a totally precast structure was being proposed, similar to those at Casa Loma and Pearson, using Double Tees. This proposal was ultimately rejected. Instead, HSP was asked if the same roofing principles could be applied using steel frame and precast hollow core slab. HSP prepared a proposal based on the amended specifications (steel frame and hollow core slab instead of Double Tees and precast columns) and submitted it to Algocen.<sup>331</sup>

Before the Algo Mall, HSP had worked only on one single-level parking garage directly above retail and exposed to the elements, as in Elliot Lake. However, it had used the conventional membrane system, as opposed to the strip-membrane system.<sup>332</sup> The other parking garage over retail space, unlike the one in Elliot Lake, had not been constructed using hollow core slab with a steel supporting structure. HSP had waterproofed hollow core slab parking structures in places such as Minnesota and Chicago, but these were more typical, stand-alone parking structures, as opposed to ones located directly above retail on a single storey. In this sense, Elliot Lake was the first.<sup>333</sup>

The exposure to the elements is important, according to Mr. Monroe, because for multi-level parking, it is typically the upper, exposed level that takes the worst beating, both from exposure and owing to the fact that snowplows are driven around on that top exposed surface.<sup>334</sup> Despite these never-before-experienced design factors, HSP made its proposal to Algocen in April 1979.<sup>335</sup>

Mr. Monroe said he was never asked about the wisdom of designing the parking roof garage with core slabs, over retail and exposed to the elements.<sup>336</sup> Despite having submitted the proposal to install the Peterson system on hollow core slabs, Mr. Monroe testified, his company would have been much more comfortable with the Double Tee system, given its extensive experience with it. However, he said, “trying to put myself back to where I was at that point in time, I would have probably thought, you know, I don’t see any real reason why we can’t transfer these principles from one system to another with some tweaking.”<sup>337</sup> He added that the proposal specifically pointed out that every parking deck system requires periodic maintenance on account of traffic, weather, and snowplow maintenance.<sup>338</sup>

The Peterson proposal called for HSP to be lead contractor, with Diplock and Canadian Barrier as subcontractors. According to Mr. Monroe, the proposal was not given to an engineer for assessment but sent instead to the project architect, Mr. Keywan, for evaluation and, Mr. Monroe assumed, it would be reviewed by an engineer. The system was designed on the basis of HSP’s accumulated experience in the industry.<sup>339</sup>

The proposal gave two options. One was described in the document as the sandwich slab system, namely, a full membrane applied across the whole of the hollow core slab surface and sandwiched between the core slabs and the concrete topping above. The other system proposed was dubbed the composite slab system, which involved the application of a strip membrane and a bonded concrete topping as described above.<sup>340</sup>

Mr. Monroe explained that if the full membrane, or sandwich slab, system had been chosen, then a continuous membrane would have been applied on top of the hollow core slabs, followed by protection board and “high-density polystyrene” insulation designed to carry a traffic load, and finished with a poured concrete topping, typically 4 inches thick with reinforced mesh. In addition, at the Algo Mall the concrete topping would then have been jointed (i.e., pre-cracked) at intervals of about 15 feet as part of Peterson’s crack-control method. The cracks were to coincide with the joint formed where two slabs met. Every 30 feet, the concrete topping was to be cracked completely through to coincide with the underlying core slab, to allow the slabs of concrete topping to behave independently of one another.<sup>341</sup>

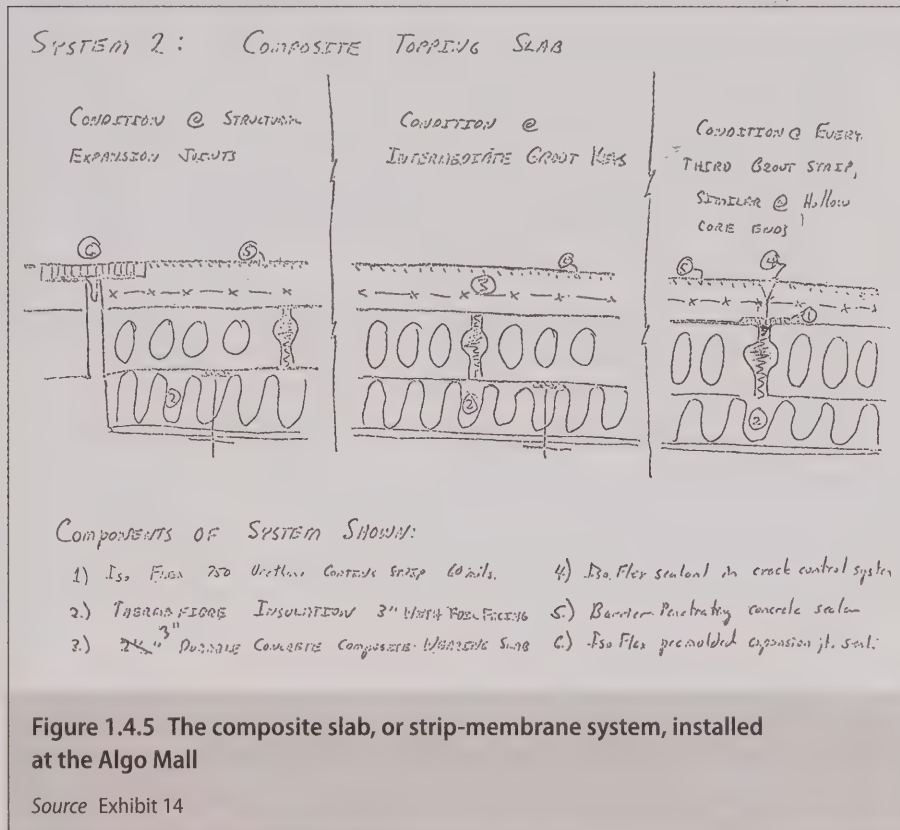
The next step, common to both the full- and the strip-membrane systems, would have been to treat the poured slab with a product such as Canadian Barrier, a penetrating sealant with no thickness to it. Its purpose is to fill the pores in the concrete and prevent water and chlorides from penetrating very deeply into the slab. This top surface is the one driven on by parking traffic.<sup>342</sup>

In the case of a full-membrane system, the concrete topping would not be bonded and would rest entirely on the insulation separation described above.<sup>343</sup>



## The “strip-membrane,” or “composite slab,” system as designed by HSP and installed at Algo Mall

The composite slab, or strip-membrane, system was the one actually installed at the Algo Mall.<sup>344</sup> As seen in figure 1.4.5, that system called for the insulation to be located underneath the hollow core slabs, allowing for the concrete topping to be bonded to the core slabs below. Mr. Monroe testified that, over time, this process meant the whole structure might be subject to volume change and movement.<sup>345</sup> As I have noted, Mr. Craig agreed with this assessment in his testimony before me.



Mr. Monroe testified that the bonding between the core slabs and the concrete topping was intended to be achieved by applying a bonding agent, which would have been a kind of slurry of cement and water brushed on ahead of the concrete pour to enhance the bond at that location. HSP expected that this bond would limit the flow of water horizontally between the hollow core slabs and the concrete topping. Mr. Monroe could not say that this bonding agent was in fact applied. He could only say that he “would guess” that it was done.<sup>346</sup> He said that the freeze–thaw cycle could affect the bond over time and that, if a significant amount of water did accumulate in that space, it might break the concrete if it froze, assuming it had enough force to overcome the inherent strength of the concrete.<sup>347</sup>

Sketches on the Peterson proposal also indicated the intention, with the strip-membrane system, that Peterson's crack-control joints would be located at every third grout strip and at the hollow core butt ends, with no crack-control joints at the intermediate grout keys separating the hollow core slabs.<sup>348</sup> Mr. Monroe described the butt joints as definite movement locations, where crack control was necessary. As traffic crosses the slabs, he expected, it would cause a hammering effect in the middle of the slab that pushes up the two butt ends. His assumption was that cracking would occur there, but that it would be restrained by the grouting, the inherent reinforcement in the hollow core, the wire mesh in the concrete topping, and the pre-cracking at that location.<sup>349</sup> His evidence was that every butt joint was to be pre-cracked and sealed.<sup>350</sup>

Mr. Monroe was questioned on whether there was an "expansion joint" at the butt ends of the slabs such that the concrete topping was cracked all the way through to allow movement. Mr. Monroe indicated that this was not the case, and that pre-cracked control joints located at the butt joints were similar to the pre-cracked control joints located along the length of every third core slab. This crack was supposed to be approximately one-fifth of the thickness of the concrete topping (thus, approximately 3/4 of an inch), but at least 1/2 inch in depth, with no cutting of the concrete below that.<sup>351</sup> The crack was created with a hand tool similar to what is used for sidewalks, when the concrete is in a plastic condition. It has a V shape. The elastomeric sealant is then applied, filling the joint to approximately 1/8 inch below the surface of the concrete topping.<sup>352</sup>

The sketches indicated that the strip membranes were to be installed directly below these crack-control joints to create redundancy by way of a secondary seal against water infiltration. The system was then made composite, or bonded, across the whole deck, except over "that little one-inch condition,"<sup>353</sup> meaning there was no composite action between the concrete topping and the slab where these materials were separated by the strip membrane.

This was the theory behind how the strip-membrane Peterson system would protect the Algo Mall from water infiltration. HSP was familiar with the cracking behaviour of concrete topping above Double Tees. It was not familiar with the cracking behaviour of concrete topping when placed above the smaller, more numerous hollow core slabs. Mr. Monroe also indicated to the Commission that there were concerns that the hollow core slabs were grouted throughout, making them stiffer.<sup>354</sup>

According to Mr. Monroe, however, HSP had carefully considered the different structural situation when using hollow core slabs and come up with the solution to place the crack-control joints at the butt end of every slab, but lengthwise only at the grout key of every third slab. The conservative approach for crack control would have been to put a joint above every place where the slabs met underneath. However, HSP worried that this solution might create more problems than it solved because the crack-control joints, as described by Mr. Monroe, were the sensitive part of the waterproofing system. They required maintenance over time. In fact, in the normal course, HSP advised its clients to budget for the eventual necessity of replacing or reapplying the sealants (including the Canadian Barrier sealant for the concrete surface), membranes, and expansion joints after five to 10 years.\* The strip membrane, because it was not directly exposed to the elements, could perhaps have lasted two to three times as long.<sup>355</sup> The concrete, by comparison, was high-quality, durable concrete, with an estimated service life, according to Mr. Monroe, of 30 to 50 years.<sup>356</sup>

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\* Monroe testimony, March 7, 2013, pp. 575–6. Mr. Monroe explained that the sealant would not necessarily fail after five to 10 years, but that it would have served its useful life. He also indicated that the lifespan of these products would be longer if not exposed to the elements: Monroe testimony, March 8, 2013, pp. 712–4. See Monroe testimony, March 8, 2013, pp. 803–4, for his comments on the lifespan of the Canadian Barrier product (where he suggests it be reapplied every five years).

For all these reasons, related to maintenance and the vulnerability of the crack-control joints, HSP instead felt it would be better to place the longitudinal joints at every third slab. If there was some additional cracking, Mr. Monroe said, HSP felt “it wouldn’t be extensive, and repairing those cracks would be a more effective solution on a cost basis and a performance basis than trying to triple the number of joints that we’d have to deal with.”<sup>357</sup> An additional factor that influenced HSP’s reasoning related to how the company thought the core slabs were going to behave. It did not believe that the cracking would be significant at the intermediate locations because the keys between the slabs were grouted together. In theory, the grouting should have caused the slabs to work together as a unit.<sup>358</sup> This result did not happen. In fact, almost *all* the concrete cracked above almost all the grout keys between the slabs.

Mr. Monroe was asked what would happen to water that managed to penetrate the crack-control joints, assuming the bonded system around it kept it along the length of the grouted and sealed joints between the core slabs. He admitted this question was a bit of an unknown. From its previous work at Casa Loma, the company believed it did not matter and that this water would eventually evaporate out, unless there was a lot of water and it froze.<sup>359</sup> Mr. Monroe agreed, though, that HSP’s design made no provisions for evacuating water that did make it past the crack-control joints to the strip membranes.<sup>360</sup>

Despite the fact that HSP was charting new territory with the application of its crack-control system to hollow core slabs, it nevertheless suggested that the way in which the concrete topping would crack was predictable, and that the other elements of the design, including the strip membrane and the concrete sealant, would work as planned. In the HSP proposal, Mr. Monroe wrote:

The cracking patterns of toppings over precast structural members are predictable to us and can be controlled with 99+% accuracy by tooling joints in the concrete topping over the ends of the hollow core slabs and every third grout key in the longitudinal direction. Careful sealing of these joints with Iso-Flex Urethane Sealant will successfully control water seepage through this controlled crack pattern. Since the possibility exists that minor seepage *could* result from concrete spalls behind the sealant related to traffic and/or snow plows it is proposed that an Iso-Flex Urethane strip membrane be applied immediately below the crack control joints to stop any moisture from getting through the grout key in the case of a composite topping. The concrete surface, carefully cured and sealed will serve its own waterproofing function.<sup>361</sup>

The Peterson strip-membrane system was cheaper. Its cost was quoted at \$397,600 in 1979 dollars, as compared to \$534,000 for the full-membrane system.<sup>362</sup> HSP also strongly promoted the strip membrane as the best system overall:

A complete integrated waterproofing system has been described herein for both a sandwich slab system and a composite slab system. While we are willing to provide a strong guarantee with either system, and despite the conventional wisdom that the traditional sandwich slab concept is best, we would strongly recommend the composite slab system as the best long-term solution because of the reduced number of field problems we have experienced with this approach, the ease of future maintenance and the lower initial cost. The fact of the matter is that the track record for double slabs is not good, while the composite slab approach, while fewer in number, has proved very successful.<sup>363</sup>



## The waterproofing system used at the Algo Mall was a first and last for HSP

Mr. Monroe admitted that, in reality, there were no true comparables for the system as installed in Elliot Lake. He agreed it was a “first” but suggested that this fact was not something it tried to hide from Algocen in any way.<sup>364</sup> Indeed, throughout these proceedings, the Commission saw no information to indicate that something like it had ever been applied before in a situation analogous to that of the Algo Mall – namely, a parking deck above retail space, exposed to the elements, using hollow core slabs and steel framing. An article published in or about January 1980 in *Canadian Building* magazine described the Peterson waterproofing system installed at the Algo Centre as an “evolutionary and economical new method for making hollow-core pre-stressed concrete roof parking decks watertight and salt resistant” and stated that it was “being used for the first time in North America by Algocen Realty Holdings Ltd. on its \$12-million Commercial Centre under construction at Elliot Lake, Ont.”<sup>365</sup>

HSP never installed another waterproofing system like the one installed at the Algo Mall.<sup>366</sup> Mr. Monroe indicated that the reason was because the opportunity never presented itself again. The hollow core structural system, he said, “just wasn’t competitive,” technically and economically, with the longer-span Double Tee systems. He said, as well, that “cast-in-place post tension options” came along that were better and more economical.<sup>367</sup>

## NORR indicated that the HSP waterproofing system had inherent flaws

In its review, NORR commented on HSP’s assertion that it could control the cracking in concrete topping by placing crack-control joints above every third longitudinal joint between the core slabs. Dr. Saffarini observed that, over time, the opposite was true. The crack control had originally been placed at every third joint, but eventually the need arose to seal every joint between the slabs because of the cracking that occurred during the life of the structure.<sup>368</sup> Dr. Saffarini concluded that HSP underestimated the cracking that would occur. However, even if HSP had originally “crack controlled” all the joints (instead of every third one), other problems would have arisen with sealant failure related to temperature changes, concrete shrinkage, and other factors. As a whole, Dr. Saffarini opined, HSP’s assertion was untenable.\*

## Algocen was warned about the potential for the HSP waterproofing system to fail – and it ignored that warning

Although Algocen chose the strip-membrane system over the full-membrane one, there was some evidence to indicate it had concerns about the novelty of the system. Algocen obtained a second opinion about the efficacy of the system. A letter dated May 11, 1979, from A.E.J. Cunningham Consultants Ltd., an independent professional roofing consultant, commented on the proposed “rooftop water-proofing system” at the Mall. The letter described the weak link in the system as the “pre-cast concrete deck,” which Albert John Cunningham described as “liable to creep which progresses over the years.” The same letter also suggested that, since roofs never last the life of a building, the roof structure should be designed to carry a 3-inch concrete wearing slab and membrane in addition to the proposed system, to “allow structurally for a new roof to be applied over the top of the original one” as a “precaution against the failure of the original system years hence. In other words, over-design the system for additional load.”<sup>369</sup>

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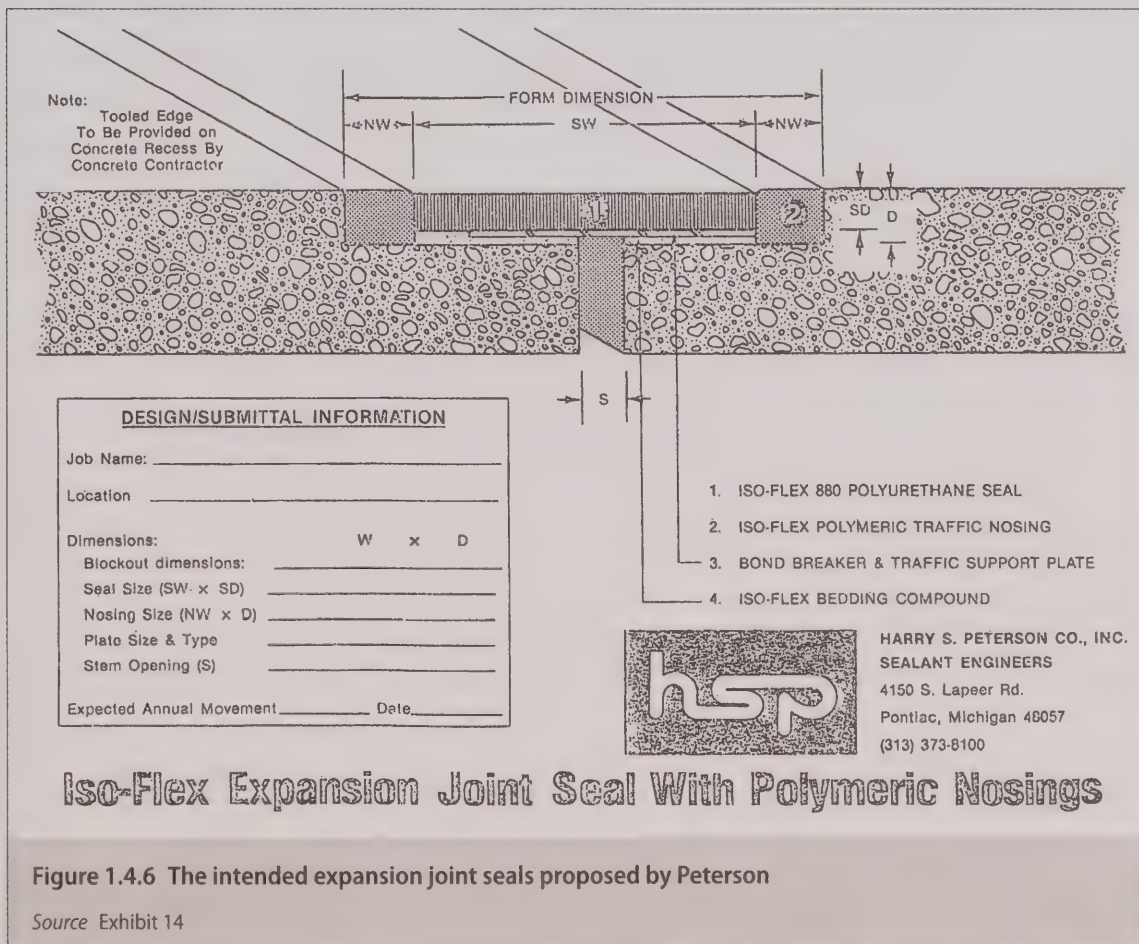
\* NORR Panel testimony (Saffarini), May 30, 2013, pp. 12495–6. For a similar statement from Dr. Saffarini, see NORR Panel testimony (Saffarini), May 30, 2013, p. 12566, where he suggests that, if Peterson had pre-cracked above every longitudinal grout key, it would have increased the probability of failure of the joints themselves.

There is no evidence to suggest that Algocen heeded any of this advice. On the contrary, it appears from the evidence heard during the course of the Inquiry that Algocen ignored Mr. Cunningham's warnings and proceeded with the system proposed by HSP. Had Algocen followed Mr. Cunningham's advice, namely, that it should "over-design the system for additional load," it is possible that many of the difficulties the Mall faced over its lifetime might have been avoided. It became apparent later in the evidence presented before the Commission that Algocen had a pattern of ignoring the advice of its consultants and choosing instead to proceed down its own path.

## The expansion joints – poorly designed for a parking deck

HSP was also responsible for the design and installation of the major expansion joints at the Algo Centre. The expansion joints created an opening in the building from the structural steel up through to the concrete topping.<sup>370</sup> Absent proper detailing, water penetrating through these areas would have nothing to stop it from going straight down into the building.

The intended expansion joint seals for the structural expansion joints in the Algo Centre were described in the Peterson proposal (see figure 1.4.6).<sup>371</sup> They were composed of an aluminum traffic plate embedded into the concrete on either side of the expansion joint gap, and spanning over that gap. The traffic plate was bonded on one side to allow movement back and forth. On top of the traffic plate was an Iso-Flex polyurethane seal; and to either side of that was "polymeric traffic nosing,"<sup>372</sup> meant to hold everything in place.<sup>373</sup>



As a second layer of protection, the expansion joints had a small neoprene loop, like a trough, sitting underneath the expansion joint seals. Mr. Monroe described it as rubber, going the distance of the expansion joint and connected by a little tube to a drain that was usually located at the end of the joint. Its purpose was to collect any water that made its way through the first layer of protection (i.e., the expansion joint sealing mechanism) and funnel that water to a drainage area.<sup>374</sup>

In his evidence, Mr. Hughes of NORR also referred to the original design of the expansion joint. He felt the design was a poorly considered detail for an environment where the roof is expected to take automotive traffic, snow, rain, de-icing salts, and all sorts of debris. Mr. Hughes noted that a properly detailed expansion joint for this type of project – a parking deck – would have been a “low profile.”<sup>375</sup>

## **The drains and slope of the roof – difficult design, not well maintained**

HSP was also responsible for the sloping of the concrete topping toward the drains as part of the system for getting water off the roof.<sup>376</sup>

Mr. Hughes examined the roof drains after the collapse and noted that, although they were originally intended to be single drains, they had been twinned up at some point during the life of the building and were actually double roof drains (meaning that they were side-by-side roof drains).<sup>377</sup> Mr. Hughes explained that the roof drain he observed after the building’s collapse was designed to capture water at two levels simultaneously, both surface run-off and water that penetrates through the roofing surface. The fact that the drains were two-stage was confusing to NORR:

The drains we saw on site were all two-stage drains. This is confusing, at best, since there is no indication that the water had any ability to move between the layers of concrete towards the drain.

Even if they had, well, even if they had, there is no ability for it to get into the drain body with this kind of detail as it was installed.

So, what this tells us is there was generally a lack of understanding of how this roof drain was supposed to work, how the roof overall was supposed to work or drain the water effectively, and had been installed without proper oversight or any clear objective as to what was being done here.<sup>378</sup>

Trow was retained by Algocen to inspect the building in 1991. It found that the drains for the rooftop parking were single level, indicating that the creation of bi-level drains occurred after that time:

The existing drainage system consists of two (2) drains per location on the top surface of the roof slab. The roof slab drains did not appear to be bi-level drains and therefore collected only surface water runoff and not any suspected water entrapped between the concrete topping and precast slabs.<sup>379</sup>

The same report went on to say that “[w]ater appears to be entrapped between the concrete topping and precast slab due to inadequate drainage and water tightness of the concrete topping.” It included a recommendation that drains be made bi-level,<sup>380</sup> and it may have been as a result of this report that Algocen had bi-level drains installed on the roof. NORR was critical of the fact that Mr. Keywan’s drawings provided no details of the way the drains were to be installed, noting that such details were important if water was to be drained and channelled properly.

The concrete topping had different sloping and “crickets” designed into it to assist in directing water on the rooftop toward the drains. In its report, NORR expressed concern about the sloping of the roof and the fact that the roof design specifically intended that water flow across the expansion joint at grid F/FX to get to the drain at gridline E. NORR mentioned the numerous reports and photos indicating that standing water was present at that particular expansion joint, although it is unclear whether this was true from day one. NORR stated that allowing



water to pass over an expansion joint must be handled carefully.<sup>381</sup> NORR added its opinion that, given the overall low slope of the roof, the roof could not meet the Code requirement to “shed” water, but instead needed to rely on drainage.<sup>382</sup>

### **Mr. Keywan was not retained to select or review the HSP system**

As discussed earlier, Mr. Keywan consistently stated that he had nothing to do with the waterproofing at the Algo Centre. Although an architect typically deals with waterproofing a building, it was not the case for this project.<sup>383</sup> Mr. Keywan agreed that it was the architect’s responsibility to at least know about the building envelope, but he would not go so far as to say that it was his responsibility. When asked whether a new system such as the Peterson system caused him concern, he stated: “Well, it means that I can’t say that it is going to work because I don’t know.”<sup>384</sup> (He made this statement despite Mr. Monroe’s assertion that the proposal was sent to Mr. Keywan for approval.) The evidence on this issue is contradictory and it is consequently difficult to determine if Mr. Keywan ever gave much thought or consideration to the waterproofing once he was advised that Algocen would be taking responsibility for this part of the work.

Mr. Keywan never met anyone from HSP.<sup>385</sup> He testified that he had not seen the April 1979 HSP proposal during the construction process. Mr. Hirt had described the Peterson system to him verbally. Mr. Keywan’s only concern “was did I have anything on my drawings that would not permit him to put his Peterson system properly, and he said no, he said it is fine.”<sup>386</sup> Mr. Keywan said that he was never asked to approve drawings related to the roof membrane system.<sup>387</sup>

### **Mr. Kadlec gave no advice on the reasonableness of installing an untested and unproven method of waterproofing**

Mr. Kadlec testified that he was not involved at all in the waterproofing system, nor was he even involved in the creation and application of the composite slab. His drawings would have given no indication of the type, if any, of roofing membrane to be applied, as this job would belong to a different profession.<sup>388</sup> He said that he did design and locate the expansion joints (which I understand to mean that he indicated in his drawings where they should be located, without setting out the specific detailing of how they would be waterproofed).<sup>389</sup> He said it would have been someone else’s responsibility to ensure that the expansion joint opening made its way up through the concrete topping. The concrete topping was not part of a composite system in his drawings, and there was no intention that it was to be. Mr. Kadlec did not consider the concrete topping as part of the structure and therefore did not consider it his responsibility. He said there should have been shop drawings showing how to construct the expansion joints, but his office did not prepare them.<sup>390</sup> He indicated that he had no idea whether the topping eventually went directly onto the precast and was not sure that he was ever told the insulation went underneath the slabs, instead of above them.<sup>391</sup>

### **Coreslab had no involvement in or input into the waterproofing system to be applied to the hollow core slabs**

Coreslab was never meant to be involved in any way in the waterproofing of the roof. Its quote for the project specifically said the company would not be involved in the installation of the concrete topping.<sup>392</sup> To the extent that Coreslab heard of leaks from past projects involving its product, the leaks would not be the company’s responsibility to fix. Its product was never designed to provide protection against water infiltration through the building envelope.<sup>393</sup>

During the construction process, Mr. Hellyer, Coreslab's engineer, provided some information on the interplay of waterproofing systems with Coreslab's product. Mr. Hellyer wrote to Mr. Hirt on April 5, 1979, advising him that any membrane installed should be elastic enough to accept the "minor shrinkage" that will occur in a "horizontal plane between slabs."<sup>394</sup> The letter also stated:

We have used our slabs on a number of parking structures for apartments, where the asphalt is placed directly on top of our slabs, after a water-proofing membrane has been sprayed directly on to the slab. We have had no reports of any cracking or deterioration [*sic*] of the asphalt on the structure.<sup>395</sup>

Mr. Harman, Coreslab's vice-president, did not consider that this statement was advice on the waterproofing system, so much as advice and information on the characteristics of the slabs, without recommending any particular waterproofing system.<sup>396</sup>

Coreslab's chief engineer, Ms. Saari, said that cambering of the slabs might have an effect on the caulking and the joints, damaging them "[i]f you choose to caulk the joints, yes."<sup>397</sup> She, too, however, said she has never been consulted on what would be an appropriate waterproofing system for a project using hollow core slabs, and she was not familiar with the different types.<sup>398</sup>

## 1979: Actual installation of the waterproofing system at the Algo Mall

### Strip membrane over the joints was replaced with sealant in the joints

Certain design changes were made to the strip-membrane system between the time of the proposal in April 1979 and the time the work was actually carried out.

In a letter of intent dated May 30, 1979, Algocen set out the scope of work to be performed by HSP at the Algo Mall, which included the creation of a "composite slab system for the roof top parking area" and the application of "coating strips approximately one quarter inch thick over the grouted joints in the precast slabs directly below the crack-control joint system in the composite topping slab." The letter also indicated that a 3-inch concrete slab would be applied, and a crack-control system would be tooled into the composite slab in sections no wider than 12 feet. The composite slab was to be cured with Barrier Primer and sealed with Barrier B Gloss. The expansion joints to be used were called Iso-Flex Premolded Urethane Expansion Joint Seals with secondary neoprene loops. Insulation was to be fastened below the precast slabs.<sup>399</sup>

At the end of May 1979, HSP changed its approach to the strip membrane. Instead of applying a membrane across grout keys filled flush to the top of the core slabs, HSP asked that Coreslab rake down the grouting about 1/4 inch to allow the company to put more "flexible material" at the joint than would be there with a simple membrane strip. Coreslab did this work at no extra cost, and because it was easier to install.<sup>400</sup> It appears, therefore, that the strip membrane was actually replaced with sealant placed directly in, as opposed to spanning over, the grout joints where strip membranes were called for.<sup>401</sup> Exhibit 578, dated May 28, 1979, is a sketch of this proposed change (See figure 1.4.7). This detail appears to have been accepted as noted on the sketch. Mr. Monroe believed that what was detailed in the sketch was actually installed at the Algo Mall, but he could not confirm this fact with certainty.<sup>402</sup> Evidence heard later at the Inquiry confirmed that it was indeed the sealant material within the grout key which was applied, as opposed to the originally designed strip membrane.\*

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\* Rod Caughill testimony, March 12, 2013, pp. 1351–4. Rod Caughill joined Algocen Realty in 1986 as construction superintendent and originally reported to Robert Leistner and Nicholas Hirt. At the time of his testimony, he was still with Algoma Central Property Corporation (previously Algocen) as development supervisor. He indicated to the Commission that during his first years of involvement with the Mall, Algoma cut through the topping and joints and observed that the detail as set out in Exhibit 578 was what was applied at the Mall.

## Installation was delayed until the fall, and the weather caused problems

The installation of the Peterson system (topping, crack-control joints, sealants, etc.) was supposed to start on July 16, 1979, and be completed by September 7, 1979. In its letter of intent to HSP dated May 30, 1979, Algocen stressed that time was of the essence.<sup>403</sup>

Mr. Monroe explained that these dates were chosen intentionally.<sup>404</sup> For a project of this type, he explained, typically the steel erector would do the steel work and the hollow core slab company would follow behind, installing the slabs in those areas ready to receive them. The hollow core slabs would then be grouted, and the sealant would be applied to the joints between the hollow core slabs, typically by an HSP employee.<sup>405</sup> Once the sealant was applied in the joints between the slabs, Diplock, HSP's subcontractor, would pour the concrete topping. Mr. Monroe explained that the concrete would have been poured in sections from one side of the parking deck to the other, for the entire length of the building. Carrying out the work in the warmer months would give the concrete topping sufficient curing time and allow the moisture to evaporate properly from the concrete before the final sealant was applied in the crack-control joints.<sup>406</sup>

Delays were encountered in completing the foundation work and the structure.\* As a result, the job did not start until October 1979, according to Henry Jaaskelainen, an employee of HSP in the 1970s who worked on the Algo Mall.<sup>407</sup>

The Commission heard evidence that the delays before the application of the waterproofing system created potential problems for the Algo Mall because both the concrete and the sealant were temperature and moisture sensitive. Mr. Monroe testified that by mid-October, freezing could be expected to be a potential problem in Elliot Lake. Concrete is not supposed to freeze during its curing process.

Mr. Monroe indicated that the workers were able to get the concrete in pretty quickly but, because they had to wait for the concrete to cure, it was well into November before the sealant work could begin.<sup>408</sup>

Diplock poured the concrete for the topping in November 1979 and, possibly, even into December. Because of the approach of winter, HSP's employees were not able to wait 28 days after the concrete was poured before completing the sealant work. Mr. Jaaskelainen explained that "we would like to have been allowed the curing time, but owing to extenuating circumstances we were basically forced to apply the system a lot sooner than what we would have liked to do."<sup>409</sup>

In mid-December the sealant work was almost complete, with the exception of the installation of the expansion joints. There had been more than a three-month delay from the originally planned dates.<sup>410</sup>

Mr. Monroe and Mr. Jaaskelainen both said that a lot of pressure had been placed on HSP to get the roof sealed before hard winter set in since the plan, based on discussions with Algocen, had been to install the mechanical, drywall and other interiors over the course of the winter.<sup>411</sup> Mr. Monroe testified that the delays, which forced the completion of the work in less than ideal conditions, could have affected the quality of the work. Proceeding with the work in colder weather could have affected the properties of the materials. Mr. Monroe did not believe that

**The Commission heard evidence that the delays before the application of the waterproofing system created potential problems for the Algo Mall because both the concrete and the sealant were temperature and moisture sensitive. Mr. Monroe testified that by mid-October, freezing could be expected to be a potential problem in Elliot Lake.**

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\* Mr. Monroe was aware that one of the problems related to the steel structure having been out of plumb and needing to be anchored back into place. He expressed no concern about this problem having in any way created tension or movement in the building that would have affected Peterson's waterproofing system: Monroe testimony, March 8, 2013, pp. 757–8.



the quality of the concrete topping had been affected and that the sealant placed in the grout keys likely had sufficient time to cure, because it would have been installed before the concrete topping.<sup>412</sup> It was possible that the quality of adhesion of the sealant materials installed on the concrete topping could have been compromised because, given the time of year, they likely had been subjected to snow or rain.<sup>413</sup>

Mr. Jaaskelainen testified that conditions during the installation were constantly wet. Winter came early and there were several snowfalls in October, with permanent snow on the ground by that month's end. The cold and wet weather created a difficult environment for the installation.<sup>414</sup> Measures were taken to properly apply the sealant, including in some instances, in an attempt to create a little more adhesion, using a torch to warm the surface of the joint and try to dry it before applying the sealant.<sup>415</sup>

The installation of the expansion joint seals in the winter was also not ideal. Mr. Monroe testified that summer was the preferred time to replace and/or install an expansion joint. In the winter, the gaps in the expansion joints would be at their widest. As he explained:

If you install those in cold conditions that joint is open, so the primary movement would then be together and it would put that seal in compression and it would push up. I can demonstrate that with this piece of paper. If I push this it would tend to hump up like that. And that is what the seal did as well.

And so our preference was to wait until the joint was already closed so now we're just pulling it and not pushing it for a permanent repair.<sup>416</sup>

I understood Mr. Monroe's evidence to be that an expansion joint seal installed in the winter could result in the seal being pushed higher above the surface of the parking deck from the expansion of the slabs in the heat. The raised seal in the expansion joints would then be more susceptible to damage.<sup>417</sup>

It also appears that the weather during installation could have affected the performance of the waterproofing system. Despite these issues, Mr. Monroe still had confidence in the installed product.<sup>418</sup> He may have been naively optimistic about the performance of his product, given the installation conditions encountered.

Mr. Jaaskelainen testified that at the time of installation, he believed the system would encounter problems. He recalled that in some instances, workers had been required to remove snow from the joints before the sealant could be applied. He knew at the time of installation that he would have to return to replace or repair a good portion of the sealant.<sup>419</sup> Mr. Jaaskelainen testified that he was certain he raised concerns about doing the sealant work in these conditions, and was certain the general contractor knew about the potential consequences.<sup>420</sup>

### **Installation of the system may not have been in accordance with the design**

One point of confusion in the evidence related to the nature of the crack-control joints at the butt ends of the hollow core slabs. The evidence from Mr. Monroe and Mr. Jaaskelainen was that these joints were tooled in the same manner as those done longitudinally. However, Rod Caughill testified that there was an opening all the way through the butt joints, through the entire depth of the concrete topping.<sup>421</sup>

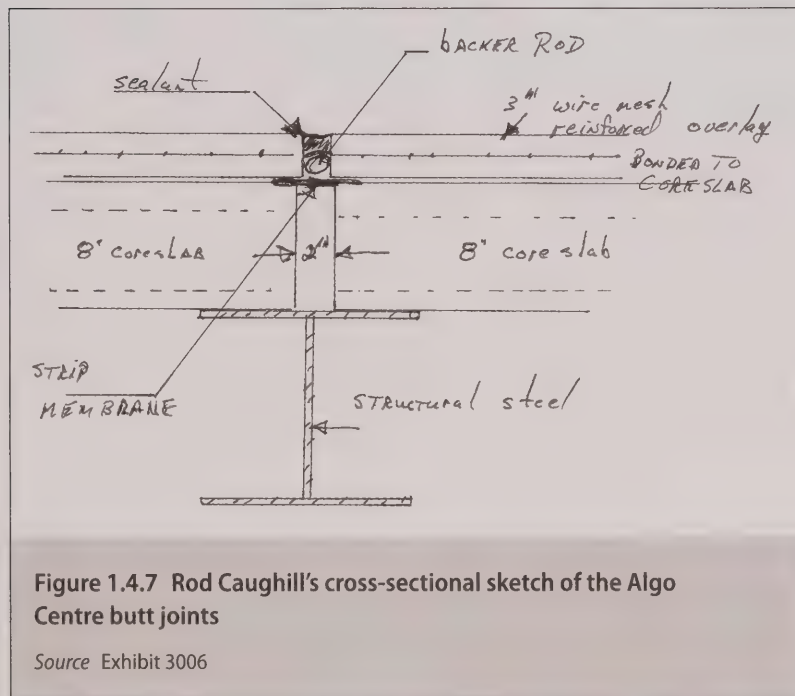
Mr. Caughill's understanding, presumably based on his observations of the rooftop deck over his years attempting to repair the Algo Mall, was that the concrete topping was not continuous across the whole deck and was not broken up only by the major expansion joints. He said, instead, that the pour was broken up at the butt ends of the hollow core slabs, leaving an expansion joint there as well (different, of course, from the major expansion joints).<sup>422</sup> His evidence was somewhat inconsistent, however. At one point he said: "It was not necessarily physically a pour that stopped and started again, but there would have been a joint built into that design. It wasn't like we poured concrete for 120 by 200 feet."<sup>423</sup> Then, when asked, he seemed to think that the concrete was poured in 30-foot sections, and that a "key" was put in at the end of each 30-foot slab. A key, he

said, was a piece of wood set in a straight line, with concrete poured on either side: "[T]he concrete is poured against a wood key, a separator, if you would, and after the concrete has set, that wood is pulled out and that is caulked to form a joint."<sup>424</sup> The key, then, was caulked with the same Iso-Flex product as the longitudinal crack-control joints, although, because of the depth of the key, a backer rod was put at the bottom of the butt joints such that the sealant did not fill the full 4 inches of depth. Mr. Caughill then suggested that this procedure allowed the core slabs underneath to move semi-independently of each other, longitudinally, by way of expansion, contraction, and cambering.<sup>425</sup>

The backer rod, according to Mr. Caughill, was just a piece of foam, which looks like rope, placed once the separator is removed to break any bond, with the caulking on top.<sup>426</sup> He made it clear that this key separated the concrete topping, not the hollow core slabs.<sup>427</sup> Below that, he believed, was the membrane, and then no grouting, as described during his testimony:

- Q. So if you went at the ends of the core slabs looking up from underneath, you would see space between the core slabs? At the top of the core slabs, there would be a membrane of some sort, a strip, just a –
- A. Correct.
- Q. – strip of caulking in other words, right?
- A. Correct, yes.
- Q. Above that would be another space and a backer rod, and above that this caulking that you have described as an expansion joint?
- A. That's correct.<sup>428</sup>

Mr. Caughill also provided the Commission with a drawing, figure 1.4.7, of this typical arrangement of the butt joints from bottom up.<sup>429</sup>



**Figure 1.4.7** Rod Caughill's cross-sectional sketch of the Algo Centre butt joints

Source Exhibit 3006

Mr. Caughill agreed that if the two levels of sealant failed – the membrane / strip and the Iso-Flex in the joint above – there was nothing else to stop water from pouring into the building, coming first into contact with the structural steel below.<sup>430</sup> His understanding was that the joint appeared this way at every point where the hollow core slabs butted up against one another at the short ends.<sup>431</sup>

## The HSP waterproofing system, as designed, met the *Building Code*; as installed, it caused problems from the outset

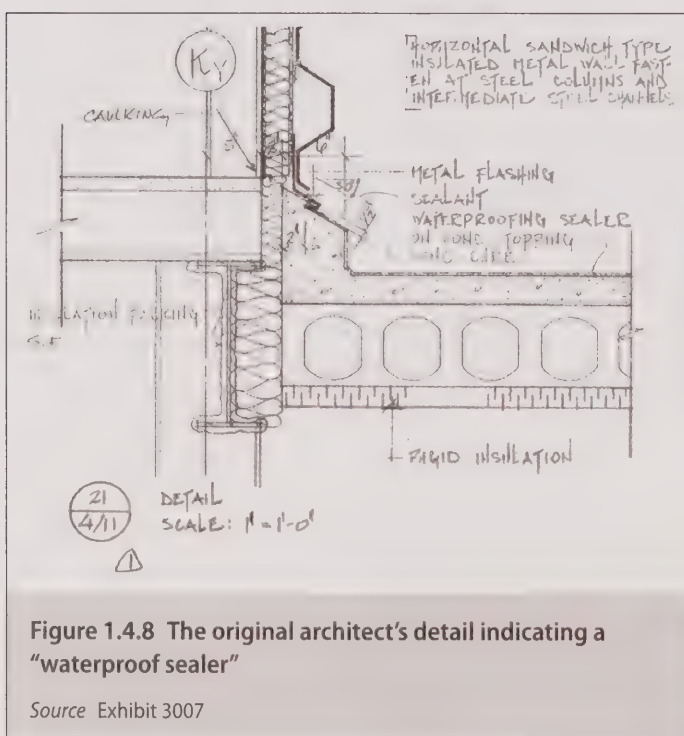
The 1975 Ontario *Building Code* was in force at the time of the construction of the Algo Centre. It required, among other things, that roofing be installed “so as to shed or drain water effectively.” However, the professionals who testified before me did not all agree that this requirement had been met by the roof design (including the Peterson system) installed at the Algo Mall.

Ontario Provincial Engineer Roger Jeffreys and Regional Engineer (Western Region) Brian Sanders, both with the Ontario Ministry of Labour, concluded in their May 22, 2013, report, entered as evidence, that the waterproofing design of the roof did not meet the 1975 Ontario *Building Code* requirement that roofing be installed so as to “shed or drain water effectively”:

While an examination of the design for the roof deck parking level might appear to indicate that the roof design narrowly met the 1975 OBC requirements for rain penetration (since the architect required the application of a waterproof sealer), it is important to note that the design did not achieve that objective. The 1975 OBC required roofing to “be installed so as to, a) shed or drain water effectively”. The evidence indicates that this design never effectively met that performance standard.<sup>432</sup>

NORR’s architect, Mr. Hughes, was a little more nuanced on this question of whether the roof was designed to shed or drain water effectively. He suggested the question boiled down to whether the building was actively

shedding or draining water; and, “given the obvious knowledge that this building was leaking since the day it opened, pretty much, it clearly was not functioning properly.” That said, viewed from the perspective of the architect in 1979, the roof waterproofing system met the Code requirements in the “thinnest of terms” because Mr. Keywan had made a note on his drawings, albeit inconsistently, that waterproofing was to be applied on top of the concrete topping, even though the type of waterproofing was not identified (see figure 1.4.8).<sup>433</sup>



**Figure 1.4.8** The original architect’s detail indicating a “waterproof sealer”

Source Exhibit 3007



Mr. Hughes did not, however find that the waterproofing design was acceptable: “Certainly not in today’s standards and in the standards at play in 1979, at the design time ... it barely meets any kind of standard in that it, again relies upon this waterproofing sealer at the top surface to act effectively.”\*

Mr. Monroe, in his testimony, felt the Peterson system addressed the requirement to shed or drain water effectively.<sup>434</sup> He was also referred during his testimony to additional provisions of the 1975 Ontario *Building Code*, such as section 4.8.1.2., subsection 1, under the heading “Control of Condensation,” which states:

Except as provided in sentence 3, where a building assembly is to be subjected to a temperature differential and differential in water vapour pressure and will be adversely affected by condensation, the assembly shall be designed to prevent condensation by providing a continuous vapour and air barrier in the assembly on the high vapour pressure side of the material that has the major thermal resistance.<sup>435</sup>

Mr. Monroe felt the Algo Mall building assembly met these criteria related to temperature differential and water vapour, and thought this *Building Code* requirement was satisfied by the fact that the Canadian Barrier product served the function of mitigating moisture and vapour migration, along with the insulation underneath which would have been the separation for temperature purposes and condensation.<sup>436</sup>

Section 4.8.1.3, subsection 1 of the 1975 Ontario *Building Code*, entitled “Control of Wind and Rain Penetration,” states that “Joints in exterior cladding, and the junctions of different exterior cladding, shall be constructed to minimize the entrance of rain water into the building assembly.” Mr. Monroe again felt the Peterson system as a whole met this requirement to prohibit the penetration of rainwater.<sup>437</sup>

The subsequent versions of the Ontario *Building Code* contain much clearer language on the types of materials to be used in roof construction and much tighter performance requirements. In particular, section 5.6.1.1(1) of the Ontario *Building Code* currently reads: “... where a building component or assembly is exposed to precipitation, the component or assembly, shall ... (b) *prevent ingress* of precipitation into interior space” [emphasis added].<sup>438</sup> Although these more stringent requirements were not in place at the time of construction of the Algo Centre, Beta’s Mr. Kadlec and NORR’s Mr. Hughes confirmed that, even in the 1980s, it was common practice to install a continuous membrane as a waterproofing system on a roof.<sup>439</sup> I am concerned that, even by today’s standards, the design of the HSP system *might* meet the requirements of the Ontario *Building Code*, provided the system was successful in preventing the entry of water into interior space.<sup>440</sup> The evidence I have heard relating to that issue is not sufficiently clear in my mind to allow me to confidently formulate an opinion. I leave that to those who have more expertise than I do, but I suggest that any ambiguity that might exist on the subject be removed by definitive and unequivocal language.

Notwithstanding this debate among the witnesses as to whether the HSP system met the requirements of the Ontario *Building Code*, I accept Mr. Hughes’s conclusion that the intent of the HSP system likely met the requirements (although narrowly). However, the functionality and compatibility of the system with hollow core slabs created a system that was difficult, expensive, and, as will be seen from the evidence, virtually impossible

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\* NORR Panel testimony (Hughes), May 30, 2013, p. 12504. For a similar conclusion from NORR’s written report, see Exhibit 3007, p. 352, section 4.1.6:

“The design of the roof assembly, when taken out of the context of as-built conditions (at time of granting of occupancy) and current conditions, can be said to narrowly meet the requirements of Part 4 of the OBC (1975) but relies entirely upon the “WATERPROOFING SEALER” material. Generally, relying on concrete sealers entirely to maintain the integrity of a building envelope is considered poor practice, let alone having the material as a horizontal layer guaranteed to be covered in water and snow, and subjected to vehicular traffic. The lack of roof drain detailing is troubling and does not speak well of the level of care given to the design of the roof. The larger issue is one of appropriateness. Having a parking deck act as the roof over occupied spaces is a challenging task from a construction detailing point of view and one would be forgiven for second-guessing the wisdom of this choice, but it is not an insurmountable challenge. However, the material choices and assembly details shown do not rise to the level of sophistication and durability required.”

to maintain. HSP's proposal was unique, unprecedented, and untested. The Pearson and Casa Loma projects used Double Tees, which had a much greater surface area than core slabs and, consequently, fewer joints. There was no supporting structural steel. HSP at no time warned Algocen about the potential fragility of its proposed system. It blithely modified a system that had previously been effective, with little apparent consideration of the potential consequences. Clearly, the manner in which the HSP system was applied to the Algo Mall was an experiment that failed.

There is no doubt that, very early on, the material failed. This almost immediate failure of the system should have spurred Algocen into action. Unfortunately, the opposite occurred and what followed were years of band-aid solutions and an ultimate decision to sell the problem.

## **1980–1985: The Harry S. Peterson Warranty Years**

### **HSP provides a five-year warranty**

As part of its contract with Algocen, HSP provided a five-year warranty, which covered the repair of all leaks resulting from poor workmanship or failed materials. Mr. Monroe described it as a type of maintenance contract, which included scheduled inspections in the spring and fall to take care of what the company assumed would be relatively minor problems. The warranty did not cover repairs resulting from improper maintenance, from abuse, or from damage to the waterproofing system from snow-removal operations.<sup>441</sup>

### **1980: The warranty period has not begun to run and the Mall is already leaking**

The complaints to HSP of leaks began almost immediately and even before the start of the warranty period, and continued during the entire warranty period. During this time, Algocen and HSP were not always in agreement on whether the cause of the leaks was related to poor workmanship and defective materials or to improper maintenance and abuse.

Mr. Monroe testified that he was expecting problems with the parking deck. He expected to find early, random cracks in the concrete topping and other problems caused by the settling of the structure. Owing to the late application of the sealant, he was expecting adhesion failure in the joints. He also expected damage from snowplows on the roof, exposure to traffic, certain weather conditions, and, perhaps, ponding of water. These were routine maintenance problems that could be fixed, with the repair cost built into its price for the Algo Mall project.<sup>442</sup>

It soon became clear, however, that the extent of the leaks was greater than anyone could have expected or imagined.

The first signs of trouble were with the expansion joints.<sup>443</sup> In late January 1980, HSP was advised that the material in the expansion joint located near Woolco was splitting and, in some areas, had become loose and dislodged from the joint.<sup>444</sup> This was not a routine problem. Mr. Monroe believed that the identified damage had been caused by traffic or snowplows on the roof. The installation of the expansion joint seals in winter conditions may have caused the seals to buckle upward, leaving it vulnerable to damage from traffic and snowplows.<sup>445</sup> This deficiency meant that, aside from the neoprene loop underneath, there was nothing to keep water from entering the building in this area.<sup>446</sup>

On March 7, 1980, Alistair B. Thomson, project manager with Algocen, wrote to Mr. Monroe, complaining of a major leak that had been occurring for at least five weeks insisting that it be fixed immediately.<sup>447</sup> At the time, it was thought the leaks could be evidence that both lines of defence in the Peterson system had failed (the crack-control joints, and the sealant in the grout keys); however, it was also thought that the leakage could be related to condensation in the Mall (an insulation problem) and/or residual water in the core slabs from when the slabs had been exposed to the elements during installation.<sup>448</sup> It soon became clear that the leaks at the Algo Mall related to more than just condensation and water accumulation in the hollow cores.

On March 24, 1980, Mr. Monroe wrote to Stephen Bailey of Algocen and acknowledged that the sealant was likely deficient because HSP had been forced to perform its work in adverse conditions the previous fall and winter. The necessary repairs, however, would have to wait until later in the spring.<sup>449</sup>

That same day, Mr. Thomson again wrote to Mr. Monroe, this time saying that further leaks had developed and that at midnight Algocen staff had dealt with severe leakage in the Woolco store. Algocen believed that the leakage related to faulty caulking in the joints in the pre-cast slabs and that there would be an urgent need for repairs once weather permitted. HSP was asked to offer suggestions for interim solutions.<sup>450</sup>

By April 1980, HSP employees were at the Mall carrying out repairs. At that point many areas required repairs to a variety of deficiencies, including leaks in the roof slab, cracks requiring grinding and filling, cracks in the penthouse steps, and leaks in the expansion joints.<sup>451</sup>

On April 29, 1980, Mr. Monroe wrote to Algocen setting out the repair work it intended to do at the Algo Mall. HSP proposed to make temporary repairs only to the expansion joint (presumably over Woolco) and in June, when the warmer weather arrived, it would permanently replace the seal in the expansion joint. HSP would also repair cracks, although some were believed to be the result of truck traffic on the deck. Mr. Monroe advised Algocen that it was “imperative that a physical barrier be constructed to keep trucks off the deck.” HSP would not be responsible for cracking unless they were physically prevented from going on the roof. The letter concluded with an acknowledgment that “leaks in the canopy roof and in other places reported appear to be the result of a variety of installation deficiencies and will be repaired or replaced in accordance with our agreement.”<sup>452</sup>

Mr. Jaaskelainen also testified about the deficiencies noted at the Algo Mall. The sealant in the crack-control joints had not adhered properly in spots, and the sealant in some joints had to be replaced in the entire length of the joint.\* It was also noted that concrete would break off and need to be patched up. Snow removal was the suspected cause of this damage.<sup>453</sup> There were also signs of surface degradation, which, Mr. Jaaskelainen testified, might have been the result of either traffic or snow removal.<sup>454</sup>

In the spring of 1980, an “unusual service condition” was observed at the Algo Mall.<sup>455</sup> Mr. Monroe testified that the Mall was expected to be subjected to normal traffic conditions (i.e., cars and some pick-up trucks looking for parking and moving about in a relatively slow and controlled manner). However, it was discovered that at certain times of the day, particularly when mine shifts changed, the Mall’s roof deck had become a shortcut for drivers seeking to avoid the traffic light at the town’s main intersection. Vehicles came up the northwest on-ramp and exited on the south ramp. According to Mr. Monroe, the Mall roof became a “street” at these times. The vehicles using the roof as a shortcut were travelling at estimated speeds of 30 to 60 miles per hour “with noticeable vibration of the structure.”<sup>456</sup>

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\* Jaaskelainen testimony, March 8, 2013, p. 852. The process followed was essentially the same as at installation and involved “upbraiding” the surface in the joint: Jaaskelainen testimony, March 8, 2013, p. 869. For cracks that weren’t straight, it was necessary to use a hand grinder to create a joint: Jaaskelainen testimony, March 8, 2013, p. 898.



As well, Mr. Monroe testified that he had been told that trucks were using the roof to make deliveries. (A barrier was eventually installed, sometime before August 1981.) This practice, along with the use of the rooftop as a shortcut, created more volume, stress, and weight than the waterproofing system had been designed to handle, not to mention concerns about the load capacity of the roof.<sup>457</sup>

Mr. Monroe testified that he believed the extensive and recurring leaks above Woolco in two locations,<sup>458</sup> identified in June 1980, corresponded with the path of the traffic shortcut across the roof.<sup>459</sup> The expansion joint running along the southerly edge of the Hotel also crossed the lane of traffic for vehicles coming up the north ramp.<sup>460</sup>

During the years when the warranty was in effect, exchanges went back and forth between Algocen and HSP as to the cause of the leaks (and over responsibility for fixing them.) In June 1980, Algocen's Mr. Pinnell was placing the blame on ineffective repair work and a lack of understanding on the part of HSP staff:

I am expecting you to do what ever is necessary to stop those leaks as this situation has reached a critical stage. I am told that Henry [Jaaskelainen] has worked in this area at other times and was not successful in stopping the water penetration which leaves me with some doubt as to his knowledge of the problem and how it should be repaired. Please make every effort to clear up this problem now as we will have no alternative but to hold your company responsible for damages.\*

By August 1980, the roof was showing signs of trouble at a second expansion joint, this one between the entrances to the Hotel and the Mall running in a north–south direction.<sup>†</sup> In addition, an August 22, 1980, letter from Algocen to HSP described leaks at 12 locations on the roof following a torrential downpour: “The problems that we are experiencing seem to be more widespread than previously noted as you can see from the list”<sup>461</sup> (see figure 1.4.9).

The expansion joints were a recurring problem. Mr. Monroe testified that by this point he had concluded that, given the traffic and snowplowing conditions, HSP had chosen the wrong expansion joint for the job. He thought it fair to describe this problem as a design flaw on the part of HSP.<sup>462</sup> The urethane material used was too soft to handle the pounding of traffic and exposure to snowplows: “[I]t was repeatedly damaged and quite frequently so.”<sup>463</sup> Mr. Monroe testified that the expansion joints were eventually replaced with a seal better suited to handle the conditions on the roof, although it is not clear when this change happened.<sup>464</sup>

On September 16, 1980, a meeting was held to deal with the parking deck leaking and water damage at the Algo Mall. Mr. Monroe and Nigel Louis from HSP were present, along with Mr. Pinnell and others from Algocen. The group toured the upper Mall during a period of hard rain to establish where the leaks were occurring.<sup>465</sup> Their observations indicated that the leaks were extensive. The roof was found to be leaking very badly in the “corner near the entrance of the upper mall,” and water was coming in around the perimeter of the Hotel. There were also leaks in the Saan Store and two other stores near the escalator, in the fast food area, in front of Woolco and the sportswear store, and elsewhere in the Mall.<sup>466</sup>

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\* Exhibit 567. See Exhibit 566 and Mr. Jaaskelainen's testimony, March 8, 2013, pp. 872–5, for his explanation of difficulties at this time with repairs to the joints related to weather conditions and a carpenter's union strike. The work, he said, was eventually done.

† Monroe testimony, March 7, 2013, p. 635; Exhibit 557. This reference is to the expansion joint located at gridlines 16X/17 and G/H on drawing S4 at Exhibit 1876, p. 42.

The group walked the parking deck and identified several areas that needed repairs. The leaking expansion joint at the Mall entrance near the escalators was in need of fixing, and the other two expansion joints had problems as well. Visible cracks in the roof also needed repair. The minutes prepared from the meeting called for a full inspection of every joint in the roof to remove and replace all the sealant that had come loose. In two locations (gridlines 12 and 16), a 4-foot strip of urethane was to be applied the full width of the building. The minutes ended with a note that the “work must be done thoroughly and immediately.” The repairs, if successful, were to mark the start of HSP’s warranty period.<sup>467</sup>

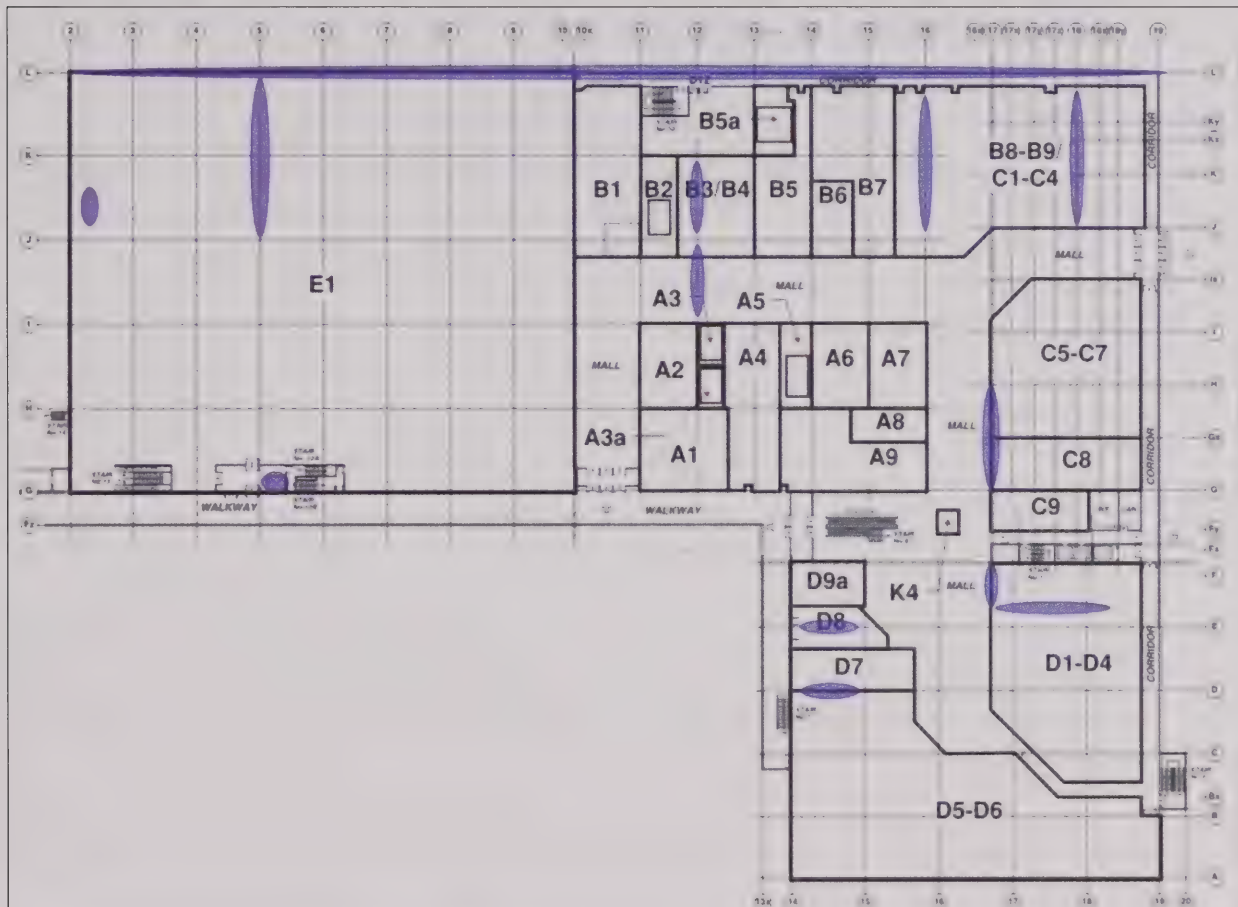


Figure 1.4.9 Leakage locations (in blue) mentioned in an Algocen letter dated August 22, 1980, after torrential rain on August 21

Source Exhibit 3007

## 1980–1985: The Mall continues to leak throughout the five-year warranty period

### November 1980: Algocen refuses to accept roof deck as complete because of leaks

Despite all the work HSP had agreed to do, the Mall continued to leak. A November 18, 1980, letter from Mr. Pinnell to Mr. Monroe described numerous leaks throughout the Mall and stated the following: “A complete summer season has gone by and your company has not been able to correct these deficiencies and give us what we contracted for, namely, a watertight parking deck and canopy.” From Algocen’s perspective, “the canopy waterproofing cannot be considered substantially complete. The parking deck will be accepted as substantially complete with reservations.” Algocen initially withheld \$18,000 until the roof was made watertight.<sup>468</sup> Mr. Monroe testified that Algocen and HSP eventually reached an agreement that Algocen would hold on to that money, and that the clock would start to run on the warranty.<sup>469</sup> Two or three years into the warranty, HSP received the \$18,000, but only after threatening not to return to the Mall to perform any further work.<sup>470</sup>

### 1981: The leaks continue – Woolco retains engineers, who recommend installation of a continuous membrane

In the spring of 1981, HSP and Algocen were still looking for solutions to the leaks above Woolco. A repair was suggested: a 30- by 40-foot traffic deck coating would be installed over the low area where the leak was occurring. As a secondary precaution, a sheet-metal pan 3 to 4 feet wide by 10 to 12 feet long was to be installed directly beneath the beam (above the ceiling tiles) to collect and channel water, and HSP would pay for it.<sup>471</sup> Mr. Monroe confirmed that at this point HSP still did not understand why the leaks were happening and could not guarantee they wouldn’t continue.<sup>472</sup>

The leaks did continue. A further meeting was held on August 11, 1981. Participants included Mr. Hirt, Mr. Pinnell, Robert Leistner,\* and Peter Pappoulas,† all from Algocen. Mr. Keywan also participated, along with Mr. Stanton of Canadian Barrier and Mr. Monroe and one of the Peterson brothers from HSP. Mr. Hirt is noted to have stated that “the roof has never been waterproofed at any time since it has been installed.”<sup>473</sup> Mr. Monroe, during testimony, agreed with this statement.<sup>474</sup>

The minutes of that meeting indicated that Algocen was concerned about structural damage to the building should water make its way into the hollow cores of the slabs and freeze, a concern Mr. Monroe did not share at the time.<sup>475</sup> The minutes also indicated that Woolco had brought in its own engineers to assess the leakage problem. Those engineers had visited the Mall and their inspection revealed, among others, the following:

- There was water staining of acoustic tiles in approximately 38 locations in the store.
- There was water in the plastic lens of the fluorescent lighting.
- Insulation was waterlogged at the underside of the hollow core pre-stressed concrete slabs in many locations throughout the ceilings.
- Water stains were observed on all structural steel beams and supports.

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\* Mr. Leistner, at the time, was a recent hire with Algocen Realty. He was the company’s controller and reported to Mr. Hirt. He went on to become general manager of the realty company in 1990: Leistner testimony, March 27, 2013, p. 3238.

† Mr. Pappoulas was the general manager of the Algo Centre at the time: Caughill testimony, March 13, 2013, pp. 1419–20.



- There was no evidence of any waterproof membrane between hollow core slabs and poured-in-place concrete topping.
- Joints in concrete topping did not coincide with joints in hollow core slabs below; hence, there were additional surface cracks. Joints were located at every third longitudinal joint rather than at every joint or hollow core slab. Additional cracking in concrete topping was evident, a result of movement (flexing) of hollow core slabs below.
- Concrete topping was not sloped at perimeter / parapet edge as detailed on drawings; hence, water remained at parapet edge.
- Water ponded on the parking surface at bearing end joint locations as a result of “camber” of hollow core slabs.
- Water run-off from the adjacent hill had left accumulations of debris and water at the “cooling tower” area over the Woolco cafeteria below. Half the bolt supports for equipment had broken off.
- Patch areas of urethane-type sealer and joints were porous and scaling.
- Expansion joints showed evidence of broken seals at the edges of the prefabricated urethane expansion joint material,
- Patchwork at joints was evident. Cracks for water entry were evident at numerous locations throughout the entire parking deck area.
- Joints were noted as poorly sealed and showing signs of having been re-worked and re-patched.
- The ceiling areas throughout the entire shopping concourse showed evidence of water stains.<sup>476</sup>

The engineers hired by Woolco in 1981 would be the first, but not the last, to recommend the installation of a full waterproofing membrane over the parking deck.\* The report recommended three different systems of waterproofing. All three involved full coverage of the roof with a membrane. The report made no mention of loading requirements.<sup>477</sup>

At the August 11 meeting, HSP was of the opinion that the expansion joints were improperly designed; the expansion joint at the escalator entrance was found to have a 3-foot-long strip where the material did not adhere to the concrete properly. The leaks over Woolco were still not understood and described as a “major problem.” The minutes also described “smaller individual leaks” throughout the building, including along the area<sup>478</sup> in front of the escalator.<sup>479</sup> Mr. Keywan suggested a flood test above Woolco to help pinpoint the source of the leaks.

The flood test was subsequently carried out using two-by-fours caulked to keep water in, filled, and placed at various locations on the roof.<sup>480</sup> As a result of this test, HSP thought it had isolated the source of the Woolco leaks as the wall along the side of the hill. The water was noted as not only leaking directly into the building, but also moving along a steel beam, travelling 30 to 50 feet from the initial source of entry, and dripping downward. HSP also thought there was evidence of water coming through the wall and into the building as a result of “hydrostatic pressure” caused by water coming down the hill and into the ground near the wall, then being pushed up through cracks in the wall.<sup>481</sup>

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\* Bregman + Hamann Report, Exhibit 6227, pp. 777–8; NORR Panel testimony (Saffarini), May 29, 2013, pp. 12255–6. Dr. Saffarini suggested that this report was passed on to the owner, who was not convinced. It is unclear on what basis Dr. Saffarini reached this conclusion. See, also, NORR Report, Exhibit 3007, pp. 298–9, for more discussion of this report.

Following the flood test, HSP did its best to repair the areas it had identified as the source of the leaks, using caulking and waterproofing materials and repairing cracks in the wall.<sup>482</sup> The flood tests were redone after the repairs, and no water penetration was observed. HSP left.<sup>483</sup>

The respite from the leaks was short-lived. Water was soon observed to be entering the building again. Mr. Pinnell called Mr. Monroe to say that the pan placed in the ceiling of Woolco had water in it. This was so even though the pan had been dry during the water tests and the parking deck above that area had revealed no obvious flaws. The source of the leaks above Woolco remained a mystery for HSP, and the company could only speculate that the cause was traffic-related: “[W]e speculated that perhaps the movement of traffic across the hollow core members was causing some flexing in the member that was opening and closing the joints” allowing water “to enter and more or less [creating] a pumping action. Because we could not make it leak just by applying the water, but under the dynamics of the traffic it was obviously still leaking.”<sup>484</sup>

An October 1981 letter from Algocen to HSP indicated that leaks persisted over Woolco and in numerous other places in the Mall, including the expansion joint at the escalator.<sup>485</sup> Mr. Monroe testified that this situation became a pattern at the Mall. Every few months the company would get reports of leaks. Some were new and would be successfully repaired; others, such as at Woolco and the major expansion joints, remained ongoing problems.<sup>486</sup>

### **1982: Every joint re-caulked, but leaks continue**

The pattern continued. Mr. Pinnell wrote on April 15, 1982, to Mr. Monroe to say that, with the warming weather, they were having “even more leaks than during the winter.” He stated: “We have not had one month of water proof performance from this roof since it was installed and it seems to be going from bad to worse.”<sup>487</sup> Mr. Monroe testified that the frequency of maintenance and return visits for the Algo Mall was among the highest he experienced in his career.<sup>488</sup>

HSP continued its attempts to repair the roof. On July 27, 1982, HSP agreed to redo every joint on the roof and to repair two depressed areas on the roof that were holding water and not draining properly. One of these depressed areas was located between the rooftop Hotel entrance and the rooftop escalator entrance, corresponding roughly to the section of hollow core slabs that collapsed in 2012.<sup>489</sup> The repairs did not solve the leakage problem. An October 15, 1982, letter from Mr. Pinnell to Mr. Monroe enclosed a plan of the rooftop parking area identifying the location of leaks as of October 12, 1982. The letter stated that, following rain on numerous days in October of that year, the roof leaked in many places and continued to do so. Mr. Pinnell wrote that it was “extremely important” that the leaks on the canopy be repaired so that “our agreement for work to be completed this fall can be fulfilled.”<sup>490</sup>

### **1983: Woolco and other tenants complain of leaks**

Barbara Cloughley provided evidence on the leaks inside Woolco. Ms. Cloughley started working at the Algo Mall Woolco in 1983, first in customer service, then as personnel manager. She held that position until 1992.<sup>491</sup> Before 1983, she had visited the Mall in a personal capacity but had not noticed any leaks, buckets, or tarps.<sup>492</sup> Once she started working at Woolco, she noticed the leaks almost immediately. Ms. Cloughley explained that every time it rained, the leaks would eventually appear.<sup>493</sup> The major leaks were located right down the centre aisle of the store, but occasional leaks occurred in other places, including her office.<sup>494</sup>

The Woolco staff dealt with the cleanup themselves because they couldn't wait for the Mall staff to take action. They would use buckets from the store to catch the leaks, sometimes having to place three together to catch all the water. They would also use plastic sheets to cover the merchandise.<sup>495</sup>

Ms. Cloughley indicated that she did not receive many complaints from employees, likely because the leaks were such a common occurrence: "We just did what we had to do to keep the floor dry so that we didn't have any customers slipping and falling, and it was just commonplace. I mean, it leaked, when it rained, you expected it to leak."<sup>496</sup>

A letter from Woolco to Algocen dated April 25, 1985, reported serious roof leaks in the store and indicated additional reports of leaks on three occasions that year.<sup>497</sup> Ms. Cloughley testified that during the period of her employment at Woolco, the leaks neither improved nor worsened.<sup>498</sup>

Mr. Monroe testified that the HSP warranty ran out sometime in 1985,<sup>499</sup> but there is some evidence to indicate that HSP may have been relieved of its responsibilities earlier. The job of redoing every joint of the roof, performed at or about the end of July 1982, had been done at HSP's expense. There was a suggestion in the evidence that, in exchange for this work, the warranty period was abridged and continued only until July 1983.<sup>500</sup> No evidence was presented to confirm whether the warranty had been shortened or had continued until 1985 (as stated in Mr. Monroe's testimony).

## **HSP and Algocen refuse to admit the obvious: the waterproofing system was not working, and something more than sealing the cracks was required**

### **HSP never understood the source of the problem**

During the warranty period, Algocen and HSP both spent considerable time, effort, and money trying to fix the roof.<sup>501</sup> HSP in particular worked on the Mall every spring and summer.<sup>502</sup> HSP had difficulty understanding the nature of the problem. Finding the source and cause of the leaks was not as simple as locating a hole where water was entering. The roof "looked fine but it was leaking, there was no question it was leaking,"<sup>503</sup> Mr. Monroe testified. Mr. Monroe told the Commission that he thought things got better over time,<sup>504</sup> but said that clearly the leaks persisted. He candidly told the Commission that HSP was never able to completely solve the leakage problem during the time its employees worked on the Mall<sup>505</sup> and admitted that he was "quite relieved when my responsibilities ran out."<sup>506</sup> Candidly, Mr. Jaaskelainen described the job at Algo Mall as the worst he'd had, a constant source of "irritation" and not "one of the ones we'd use on our sales brochure."<sup>507</sup>

Mr. Monroe told the Commission that the Algo Mall was the only job he had worked on that failed, resulting in fatality, and said that when he heard the news of the Mall's partial collapse he was "shocked and very saddened."<sup>508</sup>



## The leaks in the early years were not caused by cracks in the concrete

Mr. Monroe testified that the leaks in the first years were not the result of obvious cracking in the concrete topping because this type of damage was minimal and was repaired.\* He believed that traffic was a contributing factor. The heavy traffic and the snow removal equipment used on the roof were not things HSP would normally anticipate for a parking structure.<sup>509</sup> These may have contributed to the random cracking.<sup>509</sup> Mr. Monroe testified that he believed the manner in which snow removal was performed inflicted damage.<sup>510</sup> The sealant would have been more susceptible to snowplow damage, especially where it was pushed up above the surface of the parking deck.<sup>511</sup>

## HSP knew of the potential damage from snowplows

Some years before it began work on the Algo Mall, HSP had prepared a bulletin on snow removal because it was experiencing problems with clients who plowed without understanding the damage it could cause to its waterproofing systems.<sup>512</sup> That bulletin, prepared by Mr. Monroe, was entitled “Snow Removal Problems and the Iso-Flex T Expansion Joint” and dated October 1975. A copy was produced to the Inquiry by Algoma Central Properties, suggesting that HSP had provided Algocen with a bulletin at, or about, the time the Algo Mall was built.<sup>513</sup> The bulletin explained, among other things, how the blades on snowplows could damage not only the joints, but also the sidewalks and other things on the roof. It mentioned the importance of using rubber guards and skids, and it suggested taking other measures to avoid damage, such as plowing away from the joints and not across them, making snow removal contractors responsible for damage to heighten their awareness, marking the expansion joint locations with flags or bright painting, leaving an inch of snow or ice, and using blowers or revolving brushes instead of steel blades. Mr. Monroe testified he never saw any of these alternative snow removal measures used at the Mall. He acknowledged that he had been to the Mall in mid-winter on only two or three occasions.<sup>514</sup> He agreed that many of the suggestions were less practical in Elliot Lake, given the snow conditions and the exposed nature of the parking conditions. “I would agree with you that a lot of those things are impractical suggestions,” he said, “but it was written with our interests in mind, not the snowplow operators.”<sup>515</sup>

## HSP thought that the original expansion joints were wrong for the conditions

Mr. Monroe believed that, in addition to snowplowing and traffic issues, the initial expansion joints were the wrong type for the conditions and contributed to the leaks in the beginning. They needed to be replaced, and they were.<sup>516</sup> It would therefore appear that HSP had information relating to the feasibility of installing the composite slab system at the Algo Mall from a climatic perspective. HSP had recommended a system that it likely knew would be difficult if not impossible to protect and maintain under the harsh winter conditions that exist in Elliot Lake. It is unknown whether HSP’s snowplow bulletin was given to Algocen before or after the installation of the composite slab system. If it was provided at the time Algocen received the HSP proposal, then it should have been apparent to Algocen (a company that would have been well versed in the realities of the harsh winter conditions encountered in the area) that such a system would likely not work at the Mall.

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\* Monroe testimony, March 7, 2013, p. 577. Peterson’s typical method for repairing random cracks in the concrete topping was to follow the crack, grind it down to a certain depth, and fill it with sealant to prevent water penetration: Monroe testimony, March 7, 2013, p. 609.

† Monroe testimony, March 8, 2013, pp. 675–6. On an occasion when he was in Elliot Lake in winter, he recalled seeing the snow being removed by a front-end loader, which piled the snow and off-loaded it into a dump truck on the deck: “[T]o me that was equipment that would be heavier than you would normally expect to be used on a parking level like that.”: Monroe testimony, March 8, 2013, pp. 813–14.

### **HSP thought that the problem might have been using the core slabs, but conceded that the design was not appropriate and did not tell Algocen**

Mr. Monroe testified that he believed the main problem with the roof at the Algo Mall was the use of the hollow core slabs, which meant that there were “many, many pieces that required many, many joints where there was a much greater vulnerability.”<sup>517</sup> He suggested that the slabs might have moved in ways HSP had not anticipated. The grouting between the slabs might have broken up, and, instead of movement being transferred to the butt joints as anticipated, the individual joints around each slab moved, whether from thermal movement or from flexing due to traffic.<sup>518</sup> In retrospect, Mr. Monroe testified that the whole system needed to be replaced, “all the way down to the steel.”<sup>519</sup> Mr. Monroe also believed any type of continuous membrane system would have had its own issues, given the conditions at the Algo Mall.<sup>520</sup>

Mr. Monroe conceded that the roof design for the Algo Mall was simply not appropriate for achieving watertight conditions, a conclusion that he was starting to reach toward the end of the warranty period.\* He did not recall sharing this conclusion with Algocen.<sup>521</sup>

### **The City had the authority to require the Mall to be maintained properly but did not do so**

#### **The City’s Property Standards By-law required that buildings be structurally sound and watertight**

In addition to enforcing the requirements set out in the Building By-law, the Building Department was also responsible for enforcing the town’s Property Standards By-law. That by-law was in force at the time the Algo Mall was constructed and continues in its substantive requirements to the present day.<sup>522</sup> Among them:

- Section 4.1 required that the owner of any property repair and maintain the property in accordance with the standards set out in the by-law.
- Section 4.2 required that property be maintained in a “clean, sanitary and safe condition.”
- Section 5.1 dealt with “Structural Soundness”:
 

Every part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected. Materials that have been damaged or show evidence of dry rot or deterioration shall be repaired or replaced in a workmanlike manner.
- Section 5.4 dealt with “Roofs” and required that roofs be watertight:
 

The roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings ... The roof drainage system, where present, shall be kept in good repair, watertight, and free of health and accident hazards.
- Section 9 dealt with the Elliot Lake chief building official and the Building Department’s ability to enforce the by-law’s requirements. It included, following an inspection, the ability for the property standards officer to order the property repaired or demolished. If the owner did not comply, the town had the ability to do the required work itself and sue the owner to recuperate that cost.<sup>523</sup>

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\* Monroe testimony, March 8, 2013, pp. 752–3. Mr. Jaaskelainen agreed, as well, that the roof design was “flawed to begin with,” which meant in a sense that the other issues related to snowplowing, traffic, and late application of sealant were “inconsequential”: Jaaskelainen testimony, March 8, 2013, p. 885.

## **The by-law was enforced under a “complaint-driven” policy, which meant different things to different people**

Mr. Pigeau explained that, during his tenure, Elliot Lake did not have a program of routine, proactive inspections to enforce property standards. His department was simply too busy and never put such an initiative into place.<sup>524</sup> Elliot Lake’s Building Department had instead what Mr. Pigeau referred to as a complaint-driven process.<sup>525</sup> It was not formalized until 1995.<sup>526</sup>

### **Roger Pigeau, chief building official: without a written complaint, the Building Department would not investigate or respond unless the breach was “overtly obvious” and a safety hazard**

In addition to enforcing the Ontario *Building Code* and the Property Standards By-law, Elliot Lake’s chief building official was responsible for the enforcement of a number of other by-laws, including those relating to animal control, lottery licensing, noise control, and garbage. In addition, at the time Mr. Pigeau started as CBO in 1980, he was also a trailer park manager. He described the duties of the chief building official as “very onerous,” particularly given the large number of houses (approximately 2,000) under construction in the town during the mining boom.<sup>527</sup> In late 1980, Mr. Pigeau’s staff consisted of one building inspector, one plumbing inspector, and a secretary. He later hired an additional building inspector. By the time he left his position in 1999, Elliot Lake’s population had decreased to such an extent that his department was down to one inspector and one secretary, in addition to the CBO.<sup>528</sup>

Mr. Pigeau testified that, with no system for proactive inspections in place, a written complaint from an individual was required before his department would even act on a matter.<sup>529</sup> This response meant that unless the complaint was in writing, the department would not respond. Mr. Pigeau did tell the Commission that he would not ignore dangerous or hazardous situations just because someone had not advised him of it in writing. He favoured or preferred receiving written complaints, given the time constraints and workloads faced by his department.<sup>530</sup> Ideally, the complaint would be directed to him personally, but if by chance it went to the mayor, for example, and the mayor handed it to him, that would be sufficient for him to act.<sup>531</sup>

Mr. Pigeau said he could initiate an inspection of his own accord, which he would do in obvious situations, such as where the breach of the property standard was a safety hazard: “If it was overtly obvious then it would be ... in my job description to pursue it.”<sup>532</sup> He seemed to require that the situation be overtly and obviously dangerous before he would act on a verbal, as opposed to written, complaint from a credible person:

If it did pose an immediate danger to the public and it was openly obvious, I, as a building official, that is my responsibility to protect the public, I definitely would pursue it. It would have to be openly obvious, and I wouldn’t take that upon myself to make that decision. I would consult with other individuals, whether it be professional or not or whether it be CAO or city engineer.<sup>533</sup>

### **Larry Burling, City clerk: a response required a formal complaint from a witness willing to testify who understood the “political pressure ... if ... the mall did end up being closed”**

Larry Burling, the clerk for the City of Elliot Lake from the mid-1980s until 1999, also provided evidence about Elliot Lake’s complaints-driven enforcement system. He started working for Elliot Lake in 1976 as a by-law officer and was the deputy clerk between April 1978 and July 1985, when he became clerk. He held that position until 1999.<sup>534</sup>



Mr. Burling said he never had a formal property standards complaint directed to him personally,<sup>535</sup> and the Commission did not hear of any informal complaints about leaks at the Mall that would have come to his attention (with the exception of the Library). As such, Mr. Burling's evidence about what he would have done in such a situation was of little value. However, some of his comments showed a significant degree of inflexibility regarding what it would have taken for the Town / City of Elliot Lake to act on a property standards problem.

Mr. Burling was generally familiar with the provisions of the Property Standards By-law for the Town of Elliot Lake, which included the requirements that a building be structurally sound and watertight.<sup>536</sup> Although he agreed that the by-law was in place to ensure buildings are safe for occupancy, he repeatedly mentioned that this objective was not meant to be achieved proactively.<sup>537</sup> Furthermore, he stressed during his evidence that any complainant needed to understand that they might become a witness down the road, and needed to show a willingness to testify before he would investigate:

I know of several occasions not just on property standards, but I can think of several instances where someone comes in and they are filing a complaint. And we ask them, Okay, are you prepare[d] to become a witness? Oh no, no, no. I don't want to do that. I don't want to get that involved. I just want the problem fixed. And they back off.

And that ties our hands quite a bit as to what we can actually achieve.<sup>538</sup>

Mr. Burling defended this practice by stating that a complainant would need to understand the political consequences of their actions in the event that it led to the closing of the Mall:

Well it's important that the complainant understands that once they start the process ... we want to know that they're committed to it. Because we're going down a dark path here and it's a very serious one. And we want to make sure that they're prepared to bring it to a conclusion.<sup>539</sup>

...

They also need to be prepared, you know, to stand up to, you know, political pressure both on the street and – if for a fact the mall did end up being closed and everybody displaced.<sup>540</sup>

Mr. Burling was quite adamant in his belief that it would be inappropriate for the City's chief building official to make orders related to property standards violations without a formal complaint and the willing involvement of a witness: "[F]or him to proceed down the formal line to an order in the absence of a formal complaint you would be – it would be inappropriate to do that."<sup>541</sup> Surprisingly, Mr. Burling also suggested that a property standards prosecution advanced on the basis of observations made by city inspectors could lead to the charges being quashed by the courts: "[The complaint] would probably be quashed because the officer didn't follow established passive enforcement practices and acted inappropriately."<sup>542</sup>

Mr. Burling's evidence was generally confusing, and he appeared not to have an understanding of how proceedings under the property standards by-law would evolve. Although Mr. Burling did not appear to have dealt directly with a property standards complaint during his time as clerk, there was an inherent risk that his approach could intimidate and/or discourage a person from lodging a complaint. Furthermore, his attitude is disquieting. By requiring the citizen to shoulder the responsibility for the consequences of by-law enforcement, the citizen, and not the city, decides whether the by-law is enforced. Surely this should not, and cannot, be the approach of municipal officials to matters of public safety.

### **Paul Officer, building inspector and later acting chief building official and fire chief: investigation required a written complaint and a willing witness**

During his time as a building inspector, from 1981 to 1999, Paul Officer understood that the inspection policy for Elliot Lake was complaint-driven, meaning that the City needed to receive a complaint and wanted it in writing. This understanding confirmed the evidence of Mr. Pigeau and Mr. Burling. Mr. Officer also said, however, that, if he was in the office and a person came in to complain (about property standards or other by-law concerns), he would sit down with them to take the complaint. If it wasn't written, he would assist with writing the complaint and would explain the whole process. If the complaint involved a private dwelling, he might explain the difficulties with getting a warrant and the fact that the complainant might have to go to court to assist if they had visual knowledge of what was in the dwelling.<sup>543</sup> Mr. Officer's approach was similar to what had been described by Mr. Burling, although Mr. Officer might not have been as rigid. Nevertheless, he adopted a similar practice of advising complainants that they could be called on to testify, a possibility that could have discouraged some from following through on the complaint. Although the approach and manner of explaining the procedure may have differed, ultimately the enforcement of the policy appeared to be the same: if the complaint was not in writing it was not investigated.

### **The way in which the complaint-driven enforcement policy was applied limited protection of public safety**

There was no consistency to the approach taken by City officials in the administration of the complaint-driven policy. The effect of the differing approaches created impediments to complaints being dealt with in a way that would ensure that the by-law was properly enforced. Some City officials appeared to have adopted an approach that was quite strict. This approach put administrative convenience ahead of public safety.

### **There were no complaints in the early years**

Throughout his time as property standards officer, Mr. Pigeau did not receive any property standards complaints from Mall tenants, patrons, or employees, other than on issues related to the Library in the Mall, which will be discussed later. He also never issued a property standards order with respect to the Mall.<sup>544</sup>

Mr. Pigeau explained that Elliot Lake's Building Department received very few property standards complaints generally. He explained that across the City his department got "possibly one or two" per year, with the exception of a period when people were complaining about Rio Algoma and Denison Mines failing to properly maintain their properties. Mr. Pigeau said he was able to address these complaints without having to pursue the matter under the Property Standards By-law.<sup>545</sup> He did not recall, during his tenure as chief building official, having issued an order under the *Building Code Act*.<sup>546</sup> Mr. Pigeau did recall one case where he determined after inspection that a property was unsafe – a situation where a steel building had collapsed as a result of snow loading.<sup>547</sup>

### **The City knew that the Mall was leaking**

#### **Mr. Burling knew of the leaks**

Mr. Burling was aware that the Mall had persistent leakage problems almost from the day it was constructed and further agreed that this difficulty was something the Mall owners, for whatever reason, were unable to fix. Mr. Burling referred to it as an "ongoing issue."<sup>548</sup>

### Mr. Officer knew of the leaks

Mr. Officer spoke of his general awareness of leaks at the Mall during Mr. Pigeau's time as chief building official, and through to 2006. He told the Commission that he heard things about leaks at the Mall before 2006, but only learned through the Commission's inquiry process that the Mall had leaked from the start. He did not go often to the Mall, but through others, including his wife, he heard about leaks and that Algocen was working on the roof. He did conduct inspections at the Mall for things such as signage and minor renovations. As a result, he ended up parking on the roof and noticed that work on the caulking was taking place and that areas of the roof were cordoned off. That, however, was the extent of his knowledge about leaks at the Mall before 2006. He did not notice interior signs of leaking, or pails, hoses, and other such devices, until after 2006.<sup>549</sup>

### Mr. Pigeau knew of the leaks and did nothing

Although he was unable to provide specific dates or a timeline of leakage events, Mr. Pigeau testified that he knew the Mall leaked from the time he started working for the City through to the end of his tenure.

As time passed, Mr. Pigeau began to lose faith in the certificate of substantial completion provided by Mr. Keywan and Mr. Kadlec: "[A]s the years – as the year progressed and I found [a] few other problems, yes, I didn't put that much faith in it." In the months after the construction, he said, he had reasons to doubt aspects of the Mall construction, but he never clarified what he meant.<sup>550</sup>

Mr. Pigeau testified that the frequency and intensity of the leaks at the Mall varied, depending on the time of year. He confirmed that there were generally more leaks in the spring, but he also seemed to indicate that the presence of the pails in the Mall was a fairly regular occurrence. Mr. Pigeau was not prepared to qualify the leaks as chronic and preferred to identify them as intermittent and controlled. This assessment was based on the fact that the water accumulated in the pails, which would be emptied when full.<sup>551</sup> Mr. Pigeau suggested that for some years the leaking did not pose a problem. He did agree that the leaks persisted and that he was "sure it was" well known within the community that the Mall leaked.<sup>552</sup>

Mr. Pigeau's office was located about 500 feet from the Algo Centre. Over the years, he visited the Mall on numerous occasions to do personal errands. He also met the department heads within city hall at the Mall every morning, at approximately 9:30, for coffee. Mr. Pigeau acknowledged seeing evidence of leaks during these visits. The leaks varied in intensity: "It wasn't necessarily overly obvious, but we knew about them, yes."<sup>553</sup>

Mr. Pigeau believed Algocen had been working diligently to repair the leaks over the years. He relied on the fact that the tenants never complained to him as evidence that Algocen was working to fix the leaks. Algocen had carried out quite a few repairs, and Mr. Pigeau was aware that it had two Mall employees constantly repairing the problem or had hired firms to do so. Mr. Pigeau believed that Algocen tried to remedy the leaks by applying waterproofing compound.<sup>554</sup>

Mr. Pigeau seemed to have some knowledge of the nature of the leaks, as illustrated by this passage from his testimony in which he explains why he felt the leaks were controlled and repaired:

[I]t could start in the morning and the staff would go up onto the roof and repair the leakage problems, whether it be at a joint or at a catch basin or a grate or – in that situation the problem was repaired ... the leaks were never ongoing at the same location. They might have stopped here and started somewhere else, maybe further down the line, maybe a month, two months, three months later on.<sup>555</sup>



Mr. Pigeau believed the leak problem ceased for a period and then started up again.<sup>556</sup>

Although Mr. Pigeau seemed to have fairly detailed knowledge of the work Algocen undertook over the years to repair the roof, he did not attribute a particular date to that work. He said he knew the Mall staff would mop up water as it came in. He knew Algocen hired workers to try to seal the roof, and that the maintenance staff had done a lot of work because he saw them up there “applying a waterproofing compound of some sort, over top of areas that needed it.”<sup>557</sup> He knew, again without giving dates, that the Mall hired people to do grouting between the slabs and the drain grates and wherever the concrete assembly might be failing or the concrete spalling. And though he also knew that the staff worked on the expansion joints of the roof, he was not aware that, on occasion, the joints had been entirely replaced.<sup>558</sup>

Despite his obvious knowledge of the problems with leaks and an awareness that repairs were taking place during his time as chief building official, Mr. Pigeau never walked the 500 feet to go over and ask Algocen about the problem, nor did he send any of his staff to do so.<sup>559</sup> Mr. Pigeau appeared to have been unconcerned about the state of the Mall and the leaks that were clearly an ongoing and unresolved issue.

Mr. Pigeau agreed that the Mall’s roof was not watertight, but he was not sure whether this fact also meant the roof did not comply with Elliot Lake’s Property Standards By-law. He subsequently agreed that, as a general

**Notwithstanding his observations and knowledge that the roof was not watertight, Mr. Pigeau never conducted a property standards inspection of the Mall, ordered that one be done, or retained an engineer to do so.**

statement, if water was getting through, the roof was not watertight.<sup>560</sup> Notwithstanding his observations and knowledge that the roof was not watertight, Mr. Pigeau never conducted a property standards inspection of the Mall, ordered that one be done, or retained an engineer to do so.<sup>561</sup> Mr. Pigeau testified that, because no complaints were made to him personally, he assumed the people and tenants at the Mall were satisfied, and he knew repairs were ongoing: “[T]he mall people were satisfied and repairs were ongoing, and the leaks were stopped and so why get involved when the problem was being resolved by Algoma Central?”<sup>562</sup> He added that it was his understanding that there were portions of the year when the Mall was dry, and furthermore, that there were years when there weren’t any leaks at all.<sup>563</sup>

If Mr. Pigeau had issued an order pursuant to the Property Standards By-law, it would likely have been under section 5.4(a), which required the roof to be maintained in a watertight condition; and possibly under section 5.15, which required that floors, ceilings, and walls of every building be kept free of moisture, dampness, and resulting fungus growth. Mr. Pigeau had no concerns with the structural integrity of the building and likely would not have issued an order under section 5.1, which dealt with the structural soundness of buildings. He acknowledged that this position would likely have changed if he had been alerted to a problem through the receipt of an engineer’s report.<sup>564</sup> He also had the power to send out a Notice of Non-Conformity to the owner as well as issue an order setting out the repairs that needed to be done.<sup>565</sup> Mr. Pigeau never issued these types of orders.

### **He never required a building permit for any roof repairs**

Despite all the repairs he witnessed over the course of his tenure, Mr. Pigeau never required Algocen to obtain a building permit for the roof repairs.<sup>566</sup> He gave his opinion that a permit would have been required for the replacement of the expansion joints, but seemed to suggest this requirement was the case only if a structural engineer was involved: “[I]f it was done by a structural engineer. I can only advise that – a building permit would be required.”<sup>567</sup> His evidence was unclear on this point, because he also agreed that a building permit is required,

as set out in section 3.1 of the by-law: “When a building or any part thereof is altered ...” He agreed that changing an expansion joint altered a building and therefore required a permit.<sup>568</sup> He contradicted himself when he gave evidence that he was never aware that an expansion joint was being altered or repaired, despite having earlier said that he knew the staff was working on the expansion joints. I conclude that he knew, at a minimum, that repairs were being done to the expansion joints, and that no one from Algocen approached him for a permit of that nature.<sup>569</sup>

Similarly, Mr. Pigeau agreed that while section 9(1)(a)(vi) of the Building By-law appeared to require a permit before the removal or repair of roof draining, he was not aware that any such permit was ever applied for in relation to the Algo Centre. He also could not recall ever notifying the owners that a permit was necessary for this type of work.<sup>570</sup>

### **He never inspected the roof, and the Building Department appeared to have no concerns about the Mall**

As chief building official, Mr. Pigeau did not do any inspections of the Mall, but instead left that task to his building and plumbing inspectors.<sup>571</sup> He did say, though, that he may have come along on an inspection during Mall construction or leasehold improvements, without specifying when exactly.<sup>572</sup>

The Commission reviewed the documents and correspondence relating to inspections carried out at the Algo Centre while the HSP warranty was still in effect. The documents tended to deal with things such as tenant occupancy permits, sprinkler systems, fire separations, and other such issues. There was nothing of note in relation to leaks at the Mall, but several documents were examined relating to City concerns about the load capacity of the Mall roof and upper Mall level.

In a general sense, Mr. Pigeau said his dealings with Algocen went well, although problems surfaced and the company had to be constantly supervised throughout construction.<sup>573</sup> Presumably, by this he meant interior construction and fit-ups within the Algo Centre, since, by the time Mr. Pigeau began his employment, the Building Department was already in possession of a certificate indicating substantial completion. Mr. Pigeau described the working relationship was good and said his concerns were, in most cases, identified and repaired.<sup>574</sup>

During the years when HSP was carrying out its repairs pursuant to warranty and attempting to find solutions to the persistent leaks at the Mall (from the start of Mr. Pigeau’s term as chief building official in 1980 to approximately 1985), none of his correspondence appeared to relate to the waterproofing system or the leaks in the Mall. The only noteworthy correspondence from Mr. Pigeau to Algocen related to concerns over the load-carrying capacity of the hollow core slabs:

- with respect to the load issues, an April 2, 1982, inter-office memo to file from Mr. Pigeau discussed a meeting with Mr. Taylor from Algocen about “a few permit applications,” including a car display in the retail area on the main floor. Mr. Pigeau had concerns about the live load the display would impose on the hollow core slab below and sought a professional opinion before a permit would be allowed;<sup>575</sup> and
- Mr. Pigeau wrote to Mr. Pinnell on July 12, 1982, advising that he had information that the barricades to the upper parking area were inoperative, and that a few heavy vehicles had been seen traversing the parking lot. He asked that the situation be rectified: “I would welcome further action in remedying the problem as soon as possible, as the slab as I understand, has not been designed to carry such superimposed loads.”<sup>576</sup> He received a letter back two days later from Mr. Pappoulas, who advised that the barricades would be repaired shortly.<sup>577</sup> Mr. Pigeau’s recollection was that this incident occurred.<sup>578</sup>

Mr. Monroe testified that to his knowledge no building permit was sought or obtained from the Town of Elliot Lake, and no request was made to the town to have a building inspector review the repairs carried out on the roof by HSP.<sup>579</sup> Mr. Jaaskelainen also had no recollection of contact with the town's Building Department, nor did he recall seeing a building inspector during the time he worked at repairing the roof.<sup>580</sup>

Despite the fact that all evidence pointed to the Mall never being leak-free, even before occupancy, the Town of Elliot Lake issued numerous occupancy permits and allowed Algocen to open and operate the Mall.<sup>581</sup>

### **Conclusion: the City was wilfully blind**

I believe it would not be an exaggeration to say that Mr. Pigeau's attitude was symptomatic of the City's wilfully blind disposition in relation to the Mall. It knew the Mall was leaking and chose to do nothing.

Regrettably, in the remaining 13 years of Algocen's ownership of the Mall, business would only continue as usual.



## Notes

- <sup>1</sup> Rod Caughill testimony, March 12, 2013, pp. 1334–5.
- <sup>2</sup> Exhibit 8-00001.
- <sup>3</sup> Exhibit 8-00004.
- <sup>4</sup> Leistner testimony, March 27, 2013, pp. 3239–40.
- <sup>5</sup> Exhibit 8-00002.
- <sup>6</sup> Exhibit 8-00003.
- <sup>7</sup> Exhibit 6227, p. 5; Exhibit 3007 (NORR Report), pp. 286–7.
- <sup>8</sup> Exhibit 6227, p. 6; Exhibit 3007, p. 4289.
- <sup>9</sup> Kadlec testimony, March 6, 2013, pp. 219–21.
- <sup>10</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12411–2.
- <sup>11</sup> Kadlec testimony, March 6, 2013, pp. 221–2.
- <sup>12</sup> Kadlec testimony, March 6, 2013, p. 223.
- <sup>13</sup> See Exhibits 16, 18, 19, 22, 23, 26, 613, 614, 615, 1899, 1900, 1901, 1902, 1903, 1904, 1905; Kadlec testimony, March 6, 2013, pp. 229, 232–3.
- <sup>14</sup> Exhibit 25; Kadlec testimony, March 6, 2013, pp. 235–40.
- <sup>15</sup> Exhibit 25, p. 652.
- <sup>16</sup> Exhibit 25, p. 652.
- <sup>17</sup> Exhibit 3007, p. 4289.
- <sup>18</sup> Harman testimony March 7, pp. 407, 503.
- <sup>19</sup> Harman testimony, March 7, 2013, pp. 409–10.
- <sup>20</sup> Harman testimony, March 7, 2013, p. 410.
- <sup>21</sup> Harman testimony, March 7, 2013, p. 421.
- <sup>22</sup> Harman testimony, March 7, 2013, pp. 413–14.
- <sup>23</sup> Harman testimony, March 7, 2013, pp. 410–11, 417.
- <sup>24</sup> Harman testimony, March 7, 2013, pp. 421–2.
- <sup>25</sup> Harman testimony, March 7, 2013, p. 417; Exhibit 1933.
- <sup>26</sup> Harman testimony, March 7, 2013, pp. 427–8.
- <sup>27</sup> Harman testimony, March 7, 2013, pp. 431–2.
- <sup>28</sup> Saari testimony, May 28, 2013, p. 12096.
- <sup>29</sup> Saari testimony, May 28, 2013, pp. 12112–13.
- <sup>30</sup> Harman testimony, March 7, 2013, pp. 487–8.
- <sup>31</sup> Exhibit 1792.
- <sup>32</sup> Exhibit 1877; Harman testimony, March 7, 2013, pp. 438–9.
- <sup>33</sup> Kadlec testimony, March 7, 2013, pp. 407–8.
- <sup>34</sup> Harman testimony, March 7, 2013, pp. 451–3; Saari testimony, May 28, 2013, p. 12123.
- <sup>35</sup> Saari testimony, May 28, 2013, pp. 12125–7.
- <sup>36</sup> See, for example, Exhibit 185.
- <sup>37</sup> Saari testimony, May 28, 2013, pp. 12127–30.
- <sup>38</sup> Harman testimony, March 7, 2013, pp. 451–3.
- <sup>39</sup> Harman testimony, March 7, 2013, pp. 434–5.
- <sup>40</sup> Harman testimony, March 7, 2013, p. 420.
- <sup>41</sup> Harman testimony, March 7, 2013, p. 423.
- <sup>42</sup> Harman testimony, March 7, 2013, pp. 423–4.
- <sup>43</sup> Harman testimony, March 7, 2013, p. 425.
- <sup>44</sup> Harman testimony, March 7, 2013, pp. 428–9, 468–9.
- <sup>45</sup> Harman testimony, March 7, 2013, pp. 469–72.
- <sup>46</sup> Monroe testimony, March 7, 2013, p. 564.
- <sup>47</sup> Harman testimony, March 7, 2013, pp. 429–30.
- <sup>48</sup> Saari testimony, May 28, 2013, p. 12115.
- <sup>49</sup> Saari testimony, May 28, 2013, pp. 12113–16.
- <sup>50</sup> Monroe testimony, March 7, 2013, p. 564.
- <sup>51</sup> Saari testimony, May 28, 2013, pp. 12113–18.
- <sup>52</sup> Monroe testimony, March 7, 2013, pp. 583–4; Exhibit 3007, p. 289; Rod Caughill testimony, March 12, 2013, pp. 1343, 1376–7; Rod Caughill testimony, March 13, 2013, pp. 1398–1400; Exhibit 3003.
- <sup>53</sup> Caughill testimony, March 13, 2013, pp. 1423–4.
- <sup>54</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12214; Exhibit 3007, p. 289.
- <sup>55</sup> Exhibit 3007, p. 290.
- <sup>56</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12236.
- <sup>57</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12226–7, 12230; Exhibit 5159, p. 27.
- <sup>58</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12226–7.
- <sup>59</sup> Exhibit 3007, p. 345; see, also, sheet A18 of the architectural drawings: Exhibit 1876.
- <sup>60</sup> Exhibit 3007, p. 350.
- <sup>61</sup> Exhibit 5159, p. 27; NORR Panel testimony (Hughes), May 29, 2013, p. 12218; Exhibit 3007, p. 345.
- <sup>62</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12229–30.
- <sup>63</sup> Exhibit 3007, p. 343.
- <sup>64</sup> Canadian Standards Association.
- <sup>65</sup> Exhibit 6227, p. 088.
- <sup>66</sup> Drawings 2 to 35 (23 is missing) and five pages of preliminary drawings, including cover pages, can be found in Exhibit 1876 and Appendix E1 to the MOL Report (Exhibit 6227).
- <sup>67</sup> Drawings S1 to S18 are the structural drawings and can be found in Exhibit 1876 and Appendix E2 to the MOL Report (Exhibit 6227).
- <sup>68</sup> The 21 steel drawings can be found as Appendix E3 to the MOL Report (Exhibit 6227).
- <sup>69</sup> The shop drawings, P1, P2, 4, 5, 6, and 7, can be found as Appendix E4 to the MOL Report (Exhibit 6227).
- <sup>70</sup> Exhibit 6227, Appendix D1.
- <sup>71</sup> Keywan testimony, March 11, 2013, pp. 910–11.
- <sup>72</sup> Keywan testimony, March 11, 2013, p. 1018.
- <sup>73</sup> Keywan testimony, March 11, 2013, p. 1018.
- <sup>74</sup> Keywan testimony, March 11, 2013, pp. 914–15.
- <sup>75</sup> Keywan testimony, March 11, 2013, p. 917.
- <sup>76</sup> Keywan testimony, March 11, 2013, p. 912.
- <sup>77</sup> Keywan testimony, March 11, 2013, p. 913.
- <sup>78</sup> Kadlec testimony, March 6, 2013, p. 290; Keywan testimony, March 11, 2013, p. 987.
- <sup>79</sup> Kadlec testimony, March 6, 2013, pp. 189–90.
- <sup>80</sup> Keywan testimony, March 11, 2013, pp. 989–90.
- <sup>81</sup> Keywan testimony, March 11, 2013, pp. 989–90.
- <sup>82</sup> Keywan testimony, March 11, 2013, pp. 959–60.
- <sup>83</sup> Keywan testimony, March 11, 2013, pp. 960–1.
- <sup>84</sup> Keywan testimony, March 11, 2013, pp. 960–1, 1012, 1064–5.
- <sup>85</sup> Keywan testimony, March 11, 2013, pp. 961–2, 964–6, 1065.
- <sup>86</sup> Keywan testimony, March 11, 2013, pp. 965, 1027–8.
- <sup>87</sup> Keywan testimony, March 11, 2013, pp. 1010–11.
- <sup>88</sup> Keywan testimony, March 11, 2013, pp. 978–9.
- <sup>89</sup> Keywan testimony, March 11, 2013, pp. 1027–8.
- <sup>90</sup> Keywan testimony, March 11, 2013, pp. 918–20.
- <sup>91</sup> Keywan testimony, March 11, 2013, pp. 920–1.
- <sup>92</sup> Keywan testimony, March 11, 2013, p. 921.
- <sup>93</sup> Keywan testimony, March 11, 2013, p. 969.
- <sup>94</sup> Keywan testimony, March 11, 2013, pp. 963–4.
- <sup>95</sup> Keywan testimony, March 11, 2013, pp. 962–3.
- <sup>96</sup> Keywan testimony, March 11, 2013, p. 1007.
- <sup>97</sup> Monroe testimony, March 8, 2013, pp. 798–9.
- <sup>98</sup> Keywan testimony, March 11, 2013, pp. 966–7.
- <sup>99</sup> Keywan testimony, March 11, 2013, p. 965.
- <sup>100</sup> Keywan testimony, March 11, 2013, p. 1006.
- <sup>101</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12416–17.
- <sup>102</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12417–18.

- <sup>103</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12418.
- <sup>104</sup> NORR Panel testimony (Hughes), May 29, 2013, p. 12419.
- <sup>105</sup> Larden testimony, July 30, 2013, pp. 19084–5; Exhibit 6224.
- <sup>106</sup> Larden testimony, July 30, 2013, pp. 19086–7; Exhibit 6224.
- <sup>107</sup> Larden testimony, July 30, 2013, p. 19089.
- <sup>108</sup> Larden testimony, July 30, 2013, pp. 19152–3.
- <sup>109</sup> Larden testimony, July 30, 2013, p. 19155.
- <sup>110</sup> Larden testimony, July 30, 2013, p. 19165.
- <sup>111</sup> Larden testimony, July 30, 2013, p. 19166; Exhibit 6224, p. 7.
- <sup>112</sup> Larden testimony, July 30, 2013, pp. 19153–5.
- <sup>113</sup> Larden testimony, July 30, 2013, pp. 19164–5.
- <sup>114</sup> Exhibit 6224, p. 4; Larden testimony, July 30, 2013, p. 19101.
- <sup>115</sup> Keywan testimony, March 11, 2013, p. 988.
- <sup>116</sup> Keywan testimony, March 11, 2013, p. 984.
- <sup>117</sup> Keywan testimony, March 11, 2013, pp. 984–5.
- <sup>118</sup> Keywan testimony, March 11, 2013, p. 987.
- <sup>119</sup> Kadlec testimony, March 6, 2013, p. 188.
- <sup>120</sup> Kadlec testimony, March 6, 2013, p. 189.
- <sup>121</sup> Kadlec testimony, March 6, 2013, pp. 260–2.
- <sup>122</sup> Kadlec testimony, March 6, 2013, pp. 189–90.
- <sup>123</sup> Kadlec testimony, March 6, 2013, pp. 262–3.
- <sup>124</sup> Kadlec testimony, March 6, 2013, pp. 189–90.
- <sup>125</sup> Kadlec testimony, March 6, 2013, p. 191.
- <sup>126</sup> Kadlec testimony, March 6, 2013, pp. 193–4; Exhibit 1876.
- <sup>127</sup> Kadlec testimony, March 6, 2013, pp. 200–2, 267.
- <sup>128</sup> Kadlec testimony, March 6, 2013, pp. 265–6.
- <sup>129</sup> Kadlec testimony, March 6, 2013, p. 202.
- <sup>130</sup> Kadlec testimony, March 6, 2013, p. 202.
- <sup>131</sup> Kadlec testimony, March 6, 2013, p. 203.
- <sup>132</sup> Kadlec testimony, March 6, 2013, pp. 203–4.
- <sup>133</sup> Kadlec testimony, March 6, 2013, pp. 195–8.
- <sup>134</sup> Kadlec testimony, March 6, 2013, p. 264.
- <sup>135</sup> Kadlec testimony, March 6, 2013, pp. 204–5.
- <sup>136</sup> Kadlec testimony, March 6, 2013, pp. 206–7.
- <sup>137</sup> Kadlec testimony, March 6, 2013, p. 200.
- <sup>138</sup> Kadlec testimony, March 6, 2013, pp. 196–7.
- <sup>139</sup> Kadlec testimony, March 6, 2013, pp. 235–6.
- <sup>140</sup> Kadlec testimony, March 6, 2013, pp. 198–200.
- <sup>141</sup> Kadlec testimony, March 6, 2013, pp. 207–8. See Exhibit 1876, Drawing #S4 for roof design.
- <sup>142</sup> Kadlec testimony, March 6, 2013, pp. 208–9.
- <sup>143</sup> Kadlec testimony, March 6, 2013, pp. 215–16, 355–6, 370–1.
- <sup>144</sup> Kadlec testimony, March 6, 2013, pp. 214–15.
- <sup>145</sup> Kadlec testimony, March 6, 2013, p. 209; Exhibit 1876, Drawing #S4.
- <sup>146</sup> Kadlec testimony, March 6, 2013, pp. 210–12.
- <sup>147</sup> Kadlec testimony, March 6, 2013, pp. 331–3.
- <sup>148</sup> Exhibit 3007, p. 357; Exhibit 1876.
- <sup>149</sup> Exhibit 3007, p. 357.
- <sup>150</sup> Exhibit 3007, p. 358.
- <sup>151</sup> Kadlec testimony, March 6, 2013, pp. 216, 356.
- <sup>152</sup> Kadlec testimony, March 6, 2013, pp. 216–17.
- <sup>153</sup> Kadlec testimony, March 6, 2013, p. 217.
- <sup>154</sup> Kadlec testimony, March 6, 2013, pp. 366–7.
- <sup>155</sup> Saari testimony, May 28, 2013, pp. 12144–5.
- <sup>156</sup> Saari testimony, May 28, 2013, p. 12145.
- <sup>157</sup> Saari testimony, May 28, 2013, p. 12145.
- <sup>158</sup> Craig testimony, July 31, 2013, pp. 19384–5.
- <sup>159</sup> Craig testimony, July 31, 2013, pp. 19388–91.
- <sup>160</sup> Craig testimony, July 31, 2013, pp. 19409–10.
- <sup>161</sup> Craig testimony, July 31, 2013, p. 19410.
- <sup>162</sup> Craig testimony, July 31, 2013, p. 19411–12.
- <sup>163</sup> Kadlec testimony, March 6, 2013, pp. 367–9.
- <sup>164</sup> Kadlec testimony, March 6, 2013, p. 372.
- <sup>165</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12523–8.
- <sup>166</sup> Exhibit 5331, para. 24.
- <sup>167</sup> Exhibit 5331, para. 35.
- <sup>168</sup> Exhibit 5331, paras. 36–39, Appendix C, p. 42.
- <sup>169</sup> Exhibit 5331, Appendix C, p. 47.
- <sup>170</sup> Exhibit 5331, Appendix C, pp. 47–8.
- <sup>171</sup> Exhibit 5331, Appendix C, p. 48.
- <sup>172</sup> Exhibit 5331, Appendix C, p. 51.
- <sup>173</sup> Keywan testimony, March 11, 2013, pp. 918–20.
- <sup>174</sup> Keywan testimony, March 11, 2013, pp. 1029–30.
- <sup>175</sup> Keywan testimony, March 11, 2013, pp. 1020–4.
- <sup>176</sup> Keywan testimony, March 11, 2013, pp. 922–4.
- <sup>177</sup> Keywan testimony, March 11, 2013, pp. 924–5.
- <sup>178</sup> Keywan testimony, March 11, 2013, p. 1024.
- <sup>179</sup> Exhibit 1977; Keywan testimony, March 11, 2013, p. 926.
- <sup>180</sup> Keywan testimony, March 11, 2013, p. 930.
- <sup>181</sup> Keywan testimony, March 11, 2013, pp. 944–5; Exhibit 1978.
- <sup>182</sup> Exhibit 1981; Keywan testimony, March 11, 2013, pp. 932–3.
- <sup>183</sup> Keywan testimony, March 11, 2013, pp. 1041–6; Exhibit 1982.
- <sup>184</sup> Kadlec testimony, March 6, 2013, pp. 350–1.
- <sup>185</sup> Keywan testimony, March 11, 2013, pp. 936–7; Exhibit 1990.
- <sup>186</sup> Keywan testimony, March 11, 2013, p. 940.
- <sup>187</sup> Larden testimony, July 30, 2013, pp. 19093–9, 19106; *The Architects Act*, RSO 1970, c 27, s 16(4), referenced in Exhibit 6224. The reference to the 1975 Ontario *Building Code* is to section 2.4.
- <sup>188</sup> Larden testimony, July 30, 2013, pp. 19107–11.
- <sup>189</sup> Larden testimony, July 30, 2013, pp. 19094–5.
- <sup>190</sup> Exhibit 275.
- <sup>191</sup> Keywan testimony, March 11, 2013, p. 975.
- <sup>192</sup> Keywan testimony, March 11, 2013, p. 976.
- <sup>193</sup> Keywan testimony, March 11, 2013, p. 977.
- <sup>194</sup> Keywan testimony, March 11, 2013, p. 977.
- <sup>195</sup> Keywan testimony, March 11, 2013, p. 978.
- <sup>196</sup> Keywan testimony, March 11, 2013, p. 979.
- <sup>197</sup> Keywan testimony, March 11, 2013, p. 1014.
- <sup>198</sup> Keywan testimony, March 11, 2013, pp. 1014–16.
- <sup>199</sup> Keywan testimony, March 11, 2013, p. 1076.
- <sup>200</sup> NORR Panel testimony (Hughes), May 30, 2013, p. 12672.
- <sup>201</sup> Exhibit 6224, p. 03.
- <sup>202</sup> Exhibit 6-6; Larden testimony, July 30, 2013, p. 19116.
- <sup>203</sup> Exhibit 6-5.
- <sup>204</sup> Exhibit 6-6; Larden testimony, July 30, 2013, p. 19116.
- <sup>205</sup> Larden testimony, July 30, 2013, p. 19121.
- <sup>206</sup> Larden testimony, July 30, 2013, p. 19129.
- <sup>207</sup> Larden testimony, July 30, 2013, pp. 19134–5.
- <sup>208</sup> Larden testimony, July 30, 2013, pp. 19142–3.
- <sup>209</sup> Larden testimony, July 30, 2013, p. 19117.
- <sup>210</sup> Larden testimony, July 30, 2013, p. 19172.
- <sup>211</sup> Larden testimony, July 30, 2013, p. 19180.
- <sup>212</sup> Part 1, Written submission, James Keywan, p. 48.
- <sup>213</sup> Larden testimony, July 30, 2013, p. 19123.
- <sup>214</sup> Larden testimony, July 30, 2013, pp. 19127–8.
- <sup>215</sup> Exhibit 275; Larden testimony, July 30, 2013, p. 19128.
- <sup>216</sup> Larden testimony, July 30, 2013, p. 19136.

- <sup>217</sup> Larden testimony, July 30, 2013, pp. 19167–9; Exhibit 275.
- <sup>218</sup> Larden testimony, July 30, 2013, p. 19170. The potential use of this letter in the occupancy permit process will be addressed again below, in the section dealing with the Town of Elliot Lake's involvement during the construction process.
- <sup>219</sup> Larden testimony, July 30, 2013, p. 19181.
- <sup>220</sup> Exhibit 6224. Mr. Larden references sections 2.3.1 and 2.4 of the 1975 Ontario *Building Code*.
- <sup>221</sup> Exhibit 275.
- <sup>222</sup> Kadlec testimony, March 6, 2013, pp. 240–1, 347–8.
- <sup>223</sup> Keywan testimony, March 11, 2013, p. 1075.
- <sup>224</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12407–8.
- <sup>225</sup> Exhibit 1876, p. 42.
- <sup>226</sup> Dr. Saffarini referred to Exhibit 1926: NORR Panel testimony (Saffarini), May 29, 2013, p. 12364.
- <sup>227</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12252–3.
- <sup>228</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12364; Exhibit 3007, p. 325.
- <sup>229</sup> Exhibit 3007, p. 362.
- <sup>230</sup> Exhibit 3007, p. 362.
- <sup>231</sup> Harman testimony, March 7, 2013, pp. 489–92.
- <sup>232</sup> NORR Panel testimony, May 30, 2013, p. 12480, Exhibit 3007, p. 279.
- <sup>233</sup> Saari testimony, May 28, 2013, pp. 11975–7.
- <sup>234</sup> Exhibit 5149.
- <sup>235</sup> Exhibit 5150.
- <sup>236</sup> Saari testimony, May 28, 2013, p. 11981; Exhibit 181 is a copy of structural drawing S4.
- <sup>237</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12388; Exhibit 181 (drawing S4).
- <sup>238</sup> Saari testimony, May 28, 2013, p. 12100.
- <sup>239</sup> Saari testimony, May 28, 2013, pp. 12100–2.
- <sup>240</sup> Saari testimony, May 28, 2013, p. 11987.
- <sup>241</sup> Saari testimony, May 28, 2013, p. 11990.
- <sup>242</sup> Saari testimony, May 28, 2013, p. 12084.
- <sup>243</sup> Exhibit 1926.
- <sup>244</sup> Exhibit 3021, photographs 423, 422.
- <sup>245</sup> Saari testimony, May 28, 2013, pp. 12032–7.
- <sup>246</sup> Exhibit 5161.
- <sup>247</sup> Saari testimony, May 28, 2013, pp. 12078–90.
- <sup>248</sup> Saari testimony, May 28, 2013, pp. 12084–6; Exhibits 1877, 183, 185, 184, 186.
- <sup>249</sup> Exhibit 5149.
- <sup>250</sup> Saari testimony, May 28, 2013, pp. 12086–7.
- <sup>251</sup> Saari testimony, May 28, 2013, p. 12089.
- <sup>252</sup> NORR testimony (Saffarini), May 29, 2013, p. 12367.
- <sup>253</sup> NORR testimony (Saffarini), May 29, 2013, p. 12371.
- <sup>254</sup> Pigeau testimony, March 25, 2013, p. 2686.
- <sup>255</sup> Pigeau testimony, March 22, 2013, pp. 2538–9.
- <sup>256</sup> Pigeau testimony, March 22, 2013, pp. 2538–9.
- <sup>257</sup> Officer testimony, April 22, 2013, pp. 6036–8; Officer testimony, April 23, 2013, p. 6234.
- <sup>258</sup> Officer testimony, April 22, 2013, pp. 6036–7.
- <sup>259</sup> Officer testimony, April 22, 2013, p. 6037.
- <sup>260</sup> Pigeau testimony, March 22, 2013, pp. 2540–1.
- <sup>261</sup> Officer testimony, April 23, 2013, pp. 6290–1.
- <sup>262</sup> Pigeau testimony, March 25, 2013, p. 2755.
- <sup>263</sup> Pigeau testimony, March 22, 2013, p. 2541.
- <sup>264</sup> Pigeau testimony, March 22, 2013, p. 2541.
- <sup>265</sup> Exhibit 6-5.
- <sup>266</sup> Pigeau testimony, March 25, 2013, p. 2712.
- <sup>267</sup> Exhibit 6-5.
- <sup>268</sup> Exhibit 6-5.
- <sup>269</sup> Exhibit 6-5; Pigeau testimony, March 25, 2013, p. 2714.
- <sup>270</sup> Exhibit 6-5; Pigeau testimony, March 25, 2013, p. 2714.
- <sup>271</sup> Exhibit 6-5.
- <sup>272</sup> Exhibit 6-5.
- <sup>273</sup> Pigeau testimony, March 25, 2013, p. 2717.
- <sup>274</sup> Exhibit 6-5.
- <sup>275</sup> Exhibit 6-5.
- <sup>276</sup> Exhibit 6-5; Pigeau testimony, March 25, 2013, pp. 2722–3.
- <sup>277</sup> Pigeau testimony, March 25, 2013, p. 2722.
- <sup>278</sup> Exhibit 6-5.
- <sup>279</sup> Pigeau testimony, March 25, 2013, pp. 2792–3. This information was read into the record by counsel for the City of Elliot Lake.
- <sup>280</sup> Pigeau testimony, March 25, 2013, p. 2794.
- <sup>281</sup> Pigeau testimony, March 25, 2013, p. 2680.
- <sup>282</sup> Pigeau testimony, March 25, 2013, pp. 2791–2.
- <sup>283</sup> Pigeau testimony, March 25, 2013, pp. 2824–5.
- <sup>284</sup> Burling testimony, April 2, 2013, pp. 3900.
- <sup>285</sup> Pigeau testimony, March 25, 2013, pp. 2826–7.
- <sup>286</sup> Kadlec testimony, March 6, 2013, pp. 341–4.
- <sup>287</sup> Kadlec testimony, March 6, 2013, p. 292.
- <sup>288</sup> Officer testimony, April 23, 2013, pp. 6239–40.
- <sup>289</sup> Exhibit 290.
- <sup>290</sup> Exhibit 3260.
- <sup>291</sup> Exhibit 294.
- <sup>292</sup> Pigeau testimony, March 25, 2013, p. 2783; Officer testimony, April 23, 2013, p. 6285.
- <sup>293</sup> Exhibit 290.
- <sup>294</sup> Exhibits 282, 293, 295, 297, 1053.
- <sup>295</sup> Kewyan testimony, March 11, 2013, p. 1075.
- <sup>296</sup> Keywan testimony, March 11, 2013, p. 1070.
- <sup>297</sup> Exhibit 275; Pigeau testimony, March 25, 2013, pp. 2749–50. Elsewhere in his testimony, he said he “can’t necessarily recall seeing the document ... I might have.” Pigeau testimony, March 25, 2013, p. 2799.
- <sup>298</sup> Pigeau testimony, March 25, 2013, pp. 2751–2.
- <sup>299</sup> Pigeau testimony, March 25, 2013, pp. 2746–7.
- <sup>300</sup> Exhibits 9-1, 9-2; Pigeau testimony, March 25, 2013, pp. 2747–9, 2791, 2823.
- <sup>301</sup> Pigeau testimony, March 25, 2013, pp. 2823–4.
- <sup>302</sup> Pigeau testimony, March 25, 2013, pp. 2746–7.
- <sup>303</sup> Pigeau testimony, March 25, 2013, pp. 2755–6.
- <sup>304</sup> Exhibit 6-5; Pigeau testimony, March 25, 2013, p. 2714.
- <sup>305</sup> Pigeau testimony, March 25, 2013, p. 2713.
- <sup>306</sup> Pigeau testimony, March 25, 2013, pp. 2715–6; Exhibit 6-5.
- <sup>307</sup> Monroe testimony, March 7, 2013, p. 523.
- <sup>308</sup> Monroe testimony, March 7, 2013, p. 523.
- <sup>309</sup> Monroe testimony, March 7, 2013, p. 522.
- <sup>310</sup> Monroe testimony, March 7, 2013, pp. 524–5.
- <sup>311</sup> Monroe testimony, March 7, 2013, p. 529.
- <sup>312</sup> Monroe testimony, March 7, 2013, p. 529.
- <sup>313</sup> Monroe testimony, March 7, 2013, pp. 530–1.
- <sup>314</sup> Monroe testimony, March 7, 2013, p. 531.
- <sup>315</sup> Monroe testimony, March 7, 2013, p. 531.
- <sup>316</sup> Monroe testimony, March 7, 2013, pp. 532–3.
- <sup>317</sup> Monroe testimony, March 7, 2013, pp. 532–3.
- <sup>318</sup> Monroe testimony, March 7, 2013, p. 534.
- <sup>319</sup> Monroe testimony, March 8, 2013, p. 785.
- <sup>320</sup> Monroe testimony, March 7, 2013, pp. 533–4.



- <sup>321</sup> Monroe testimony, March 7, 2013, p. 534.
- <sup>322</sup> Monroe testimony, March 7, 2013, pp. 534–6.
- <sup>323</sup> Monroe testimony, March 7, 2013, pp. 537–8.
- <sup>324</sup> Monroe testimony, March 7, 2013, p. 541.
- <sup>325</sup> Monroe testimony, March 7, 2013, pp. 538–9.
- <sup>326</sup> Monroe testimony, March 7, 2013, p. 540.
- <sup>327</sup> Monroe testimony, March 7, 2013, pp. 542–6; Monroe Testimony, March 8, 2013, pp. 745–6.
- <sup>328</sup> Monroe testimony, March 7, 2013, pp. 546–7.
- <sup>329</sup> Monroe testimony, March 7, 2013, p. 570; Exhibit 14.
- <sup>330</sup> Monroe testimony, March 7, 2013, p. 548.
- <sup>331</sup> Monroe testimony, March 7, 2013, pp. 552–5.
- <sup>332</sup> Monroe testimony, March 7, 2013, p. 549.
- <sup>333</sup> Monroe testimony, March 7, 2013, pp. 550–1.
- <sup>334</sup> Monroe testimony, March 7, 2013, pp. 549–50.
- <sup>335</sup> Exhibit 14.
- <sup>336</sup> Monroe testimony, March 7, 2013, pp. 555–7.
- <sup>337</sup> Monroe testimony, March 7, 2013, p. 557.
- <sup>338</sup> Exhibit 14; Monroe testimony, March 7, 2013, pp. 558–9.
- <sup>339</sup> Monroe testimony, March 7, 2013, p. 560; Monroe testimony, March 8, 2013, pp. 780–2.
- <sup>340</sup> Exhibit 14.
- <sup>341</sup> Monroe testimony, March 7, 2013, pp. 561–4; Exhibit 14.
- <sup>342</sup> Monroe testimony, March 7, 2013, p. 563.
- <sup>343</sup> Monroe testimony, March 7, 2013, p. 565.
- <sup>344</sup> Monroe testimony, March 7, 2013, pp. 568–9.
- <sup>345</sup> Monroe testimony, March 7, 2013, pp. 568–9.
- <sup>346</sup> Monroe testimony, March 8, 2013, p. 773.
- <sup>347</sup> Monroe testimony, March 8, 2013, p. 775.
- <sup>348</sup> Exhibit 14.
- <sup>349</sup> Monroe testimony, March 8, 2013, pp. 776–7.
- <sup>350</sup> Monroe testimony, March 8, 2013, pp. 777–8.
- <sup>351</sup> Monroe testimony, March 8, 2013, pp. 778–80.
- <sup>352</sup> Monroe testimony, March 8, 2013, pp. 800–1.
- <sup>353</sup> Exhibit 14; Monroe testimony, March 7, 2013, pp. 568–9.
- <sup>354</sup> Monroe testimony, March 7, 2013, pp. 575–6.
- <sup>355</sup> Monroe testimony, March 8, 2013, pp. 807–8.
- <sup>356</sup> Monroe testimony, March 8, 2013, pp. 739–40, 742.
- <sup>357</sup> Monroe testimony, March 7, 2013, pp. 576–7.
- <sup>358</sup> Monroe testimony, March 8, 2013, pp. 768–9.
- <sup>359</sup> Monroe testimony, March 8, 2013, p. 770.
- <sup>360</sup> Monroe testimony, March 8, 2013, pp. 770–1.
- <sup>361</sup> Exhibit 14.
- <sup>362</sup> Monroe testimony, March 7, 2013, pp. 578–9; Exhibit 14.
- <sup>363</sup> Exhibit 14.
- <sup>364</sup> Monroe testimony, March 7, 2013, p. 581.
- <sup>365</sup> Exhibit 590.
- <sup>366</sup> Monroe testimony, March 8, 2013, p. 676.
- <sup>367</sup> Monroe testimony, March 8, 2013, p. 677.
- <sup>368</sup> NORR Panel testimony (Saffarini), May 29, 2013, p. 12493, in reference to Exhibit 14.
- <sup>369</sup> Exhibit 15.
- <sup>370</sup> Monroe testimony, March 7, 2013, p. 584.
- <sup>371</sup> Exhibit 14.
- <sup>372</sup> Monroe testimony, March 7, 2013, pp. 583–4; Exhibit 14.
- <sup>373</sup> Monroe testimony, March 7, 2013, p. 585.
- <sup>374</sup> Monroe testimony, March 7, 2013, pp. 581–2, 585; Exhibit 14 at page with numbering ending with 11980.
- <sup>375</sup> NORR Panel testimony, May 29, 2013, pp. 12244–6.
- <sup>376</sup> Monroe testimony, March 8, 2013, pp. 798–9.
- <sup>377</sup> NORR Panel testimony (Hughes), May 29, 2013, pp. 12217–20.
- <sup>378</sup> NORR Panel testimony, May 29, 2013, pp. 12222–3.
- <sup>379</sup> Exhibit 35, s. 10.2.
- <sup>380</sup> Exhibit 35, ss. 12 and 13.3.3.
- <sup>381</sup> Exhibit 3007, p. 349.
- <sup>382</sup> Exhibit 3007, pp. 349–50.
- <sup>383</sup> Keywan testimony, March 11, 2013, pp. 968–9, 978–9.
- <sup>384</sup> Keywan testimony, March 11, 2013, p. 1058–61.
- <sup>385</sup> Keywan testimony, March 11, 2013, p. 1007.
- <sup>386</sup> Keywan testimony, March 11, 2013, p. 1052; Exhibit 14.
- <sup>387</sup> Keywan testimony, March 11, 2013, p. 1085.
- <sup>388</sup> Kadlec testimony, March 6, 2013, pp. 248–9, 327–8.
- <sup>389</sup> Kadlec testimony, March 6, 2013, p. 367.
- <sup>390</sup> Kadlec testimony, March 6, 2013, pp. 368–9.
- <sup>391</sup> Kadlec testimony, March 6, 2013, pp. 371–2.
- <sup>392</sup> Harman testimony, March 7, 2013, p. 448; Exhibit 1792.
- <sup>393</sup> Harman testimony, March 7, 2013, p. 456.
- <sup>394</sup> Exhibit 446.
- <sup>395</sup> Exhibit 446.
- <sup>396</sup> Harman testimony, March 7, 2013, pp. 456–7.
- <sup>397</sup> Saari testimony, May 28, 2013, pp. 12097–8.
- <sup>398</sup> Saari testimony, May 28, 2013, pp. 12098–9.
- <sup>399</sup> Exhibit 1934.
- <sup>400</sup> Monroe testimony, March 7, 2013, pp. 587–8; Exhibit 578.
- <sup>401</sup> Monroe testimony, March 7, 2013, p. 588.
- <sup>402</sup> Exhibit 578; Monroe testimony, March 7, 2013, p. 590.
- <sup>403</sup> Exhibit 1811.
- <sup>404</sup> Monroe testimony, March 7, 2013, p. 589.
- <sup>405</sup> Monroe testimony, March 7, 2013, p. 593.
- <sup>406</sup> Monroe testimony, March 7, 2013, p. 593–4.
- <sup>407</sup> Jaaskelainen testimony, March 8, 2013, pp. 840, 846.
- <sup>408</sup> Monroe testimony, March 7, 2013, pp. 596–7.
- <sup>409</sup> Jaaskelainen testimony, March 8, 2013, pp. 846–7, 891.
- <sup>410</sup> Monroe testimony, March 7, 2013, p. 599–600; Jaaskelainen testimony, March 8, 2013, pp. 853–4.
- <sup>411</sup> Monroe testimony, March 7, 2013, p. 602; Jaaskelainen testimony, March 8, 2013, pp. 850–1.
- <sup>412</sup> Monroe testimony, March 7, 2013, pp. 602–3.
- <sup>413</sup> Monroe testimony, March 7, 2013, pp. 602–3, 605; See also Exhibit 570.
- <sup>414</sup> Monroe testimony, March 8, 2013, p. 846.
- <sup>415</sup> Jaaskelainen testimony, March 8, 2013, pp. 887–8.
- <sup>416</sup> Monroe testimony, March 7, 2013, p. 628.
- <sup>417</sup> Monroe testimony, March 7, 2013, p. 629.
- <sup>418</sup> Monroe testimony, March 8, 2013, p. 785.
- <sup>419</sup> Jaaskelainen testimony, March 8, 2013, pp. 850–2.
- <sup>420</sup> Jaaskelainen testimony, March 8, 2013, p. 854.
- <sup>421</sup> Rod Caughill testimony, March 12, 2013, pp. 1332–3.
- <sup>422</sup> Rod Caughill testimony, March 13, 2013, pp. 1427–8.
- <sup>423</sup> Rod Caughill testimony, March 13, 2013, p. 1428.
- <sup>424</sup> Rod Caughill testimony, March 13, 2013, p. 1429.
- <sup>425</sup> Rod Caughill testimony, March 13, 2013, pp. 1429–30.
- <sup>426</sup> Rod Caughill testimony, March 13, 2013, p. 1430.
- <sup>427</sup> Rod Caughill testimony, March 13, 2013, pp. 1431–2.
- <sup>428</sup> Rod Caughill testimony, March 13, 2013, pp. 1432–3.
- <sup>429</sup> Rod Caughill testimony, March 13, 2013, pp. 1502–5; Exhibit 3006.
- <sup>430</sup> Rod Caughill testimony, March 13, 2013, p. 1505.
- <sup>431</sup> Rod Caughill testimony, March 19, 2013, p. 1934.
- <sup>432</sup> Exhibit 6226, p. 51.

- <sup>433</sup> See NORR Panel testimony (Hughes), May 29, 2013, from pp. 12238 to 12242, but specifically for the quotations in this paragraph at pp. 12241–2.
- <sup>434</sup> Monroe testimony, March 8, 2013, p. 820.
- <sup>435</sup> Monroe testimony, March 8, 2013, pp. 816–17.
- <sup>436</sup> Monroe testimony, March 8, 2013, pp. 816–8.
- <sup>437</sup> Monroe testimony, March 8, 2013, pp. 818–19.
- <sup>438</sup> Exhibit 3007, p. 348; Ontario *Building Code*, O Reg 332/12.
- <sup>439</sup> NORR Panel testimony, May 29, 2013, pp. 12413–14; Kadlec testimony, March 6, 2013, pp. 257–8.
- <sup>440</sup> CSA S413-07, *Parking Structures*.
- <sup>441</sup> Monroe testimony, March 7, 2013, pp. 614–15; Exhibit 14.
- <sup>442</sup> Monroe testimony, March 7, 2013, pp. 607–9; Jaaskelainen testimony, March 8, 2013, p. 852.
- <sup>443</sup> Monroe testimony, March 7, 2013, pp. 581–2.
- <sup>444</sup> Exhibit 548.
- <sup>445</sup> Monroe testimony, March 7, 2013, pp. 610–11; Jaaskelainen testimony, March 8, 2013, pp. 855–8.
- <sup>446</sup> Monroe testimony, March 7, 2013, p. 610.
- <sup>447</sup> Exhibit 575; Ministry of Labour Report (Exhibit 6227), p. 56 also references this letter, identified as Appendix G32 to the MOL Report.
- <sup>448</sup> Monroe testimony, March 7, 2013, pp. 613, 616–7.
- <sup>449</sup> Exhibit 570.
- <sup>450</sup> Exhibit 573.
- <sup>451</sup> Exhibit 571; Jaaskelainen testimony, March 8, 2013, pp. 670–1.
- <sup>452</sup> Exhibit 569.
- <sup>453</sup> Jaaskelainen testimony, March 8, 2013, p. 860.
- <sup>454</sup> Jaaskelainen testimony, March 8, 2013, p. 861.
- <sup>455</sup> Monroe testimony, March 7, 2013, p. 630.
- <sup>456</sup> Monroe testimony, March 7, 2013, pp. 630–1; Jaaskelainen testimony, March 8, 2013, pp. 875–6; Exhibit 27.
- <sup>457</sup> Monroe testimony, March 7, 2013, pp. 631–2; Exhibit 27.
- <sup>458</sup> Gridlines H-4 and J-5 on drawing S4, Exhibit 1876, p. 42.
- <sup>459</sup> Exhibit 567; Monroe testimony, March 7, 2013, p. 632.
- <sup>460</sup> Exhibits 3003 and 3004; Caughill testimony, March 13, 2013, pp. 1403–4.
- <sup>461</sup> Exhibit 557.
- <sup>462</sup> Monroe testimony, March 7, 2013, pp. 635–6.
- <sup>463</sup> Monroe testimony, March 7, 2013, p. 636.
- <sup>464</sup> Monroe testimony, March 7, 2013, pp. 635–6.
- <sup>465</sup> Exhibit 555.
- <sup>466</sup> Exhibit 555. Appendix D lists the tenants of the Mall and their location.
- <sup>467</sup> Exhibit 555.
- <sup>468</sup> Exhibit 550.
- <sup>469</sup> Monroe testimony, March 7, 2013, pp. 641–2.
- <sup>470</sup> Monroe testimony, March 8, 2013, p. 762.
- <sup>471</sup> Exhibit 565; Monroe testimony, March 7, 2013, pp. 642–3.
- <sup>472</sup> Monroe testimony, March 7, 2013, pp. 643–4.
- <sup>473</sup> Exhibit 541.
- <sup>474</sup> Monroe testimony, March 8, 2013, p. 655.
- <sup>475</sup> Exhibit 541; Monroe testimony, March 8, 2013, pp. 655–6.
- <sup>476</sup> Bregman + Hamann Report, Exhibit 6227, pp. 765–8.
- <sup>477</sup> Exhibit 6227, pp. 777–8; NORR Report Exhibit 3007, p. 299.
- <sup>478</sup> Gridline 16 on drawing S4 at Exhibit 1876, p. 42.
- <sup>479</sup> Exhibit 541; Monroe testimony, March 8, 2013, p. 657.
- <sup>480</sup> Exhibit 541; Monroe testimony, March 8, 2013, p. 660.
- <sup>481</sup> Monroe testimony, March 8, 2013, pp. 660–4. See also Exhibit 27.
- <sup>482</sup> Monroe testimony, March 8, 2013, p. 664.
- <sup>483</sup> Monroe testimony, March 8, 2013, p. 664.
- <sup>484</sup> Monroe testimony, March 8, 2013, p. 666; Exhibit 540.
- <sup>485</sup> Exhibit 561; Monroe testimony, March 8, 2013, pp. 669–70.
- <sup>486</sup> Monroe testimony, March 8, 2013, p. 670.
- <sup>487</sup> Exhibit 530.
- <sup>488</sup> Monroe testimony, March 8, 2013, pp. 671–2.
- <sup>489</sup> Exhibit 497; NORR Report, Exhibit 3007, p. 301.
- <sup>490</sup> Exhibit 521.
- <sup>491</sup> Cloughley testimony, March 26, 2013, pp. 3175–6, 3190–1.
- <sup>492</sup> Cloughley testimony, March 26, 2013, pp. 3177–8.
- <sup>493</sup> Cloughley testimony, March 26, 2013, pp. 3179–81.
- <sup>494</sup> Exhibit 3264; Cloughley testimony, March 26, 2013, pp. 3184–6, 3190–1.
- <sup>495</sup> Cloughley testimony, March 26, 2013, pp. 3186–8.
- <sup>496</sup> Cloughley testimony, March 26, 2013, p. 3189.
- <sup>497</sup> Exhibit 1859.
- <sup>498</sup> Cloughley testimony, March 26, 2013, pp. 3190–1.
- <sup>499</sup> Monroe testimony, March 8, 2013, p. 676.
- <sup>500</sup> NORR Report, Exhibit 3007, p. 16.
- <sup>501</sup> Monroe testimony, March 8, 2013, p. 787.
- <sup>502</sup> Monroe testimony, March 8, 2013, pp. 796–7.
- <sup>503</sup> Monroe testimony, March 7, 2013, p. 634.
- <sup>504</sup> Monroe testimony, March 8, 2013, p. 676.
- <sup>505</sup> Monroe testimony, March 7, 2013, pp. 621–2.
- <sup>506</sup> Monroe testimony, March 8, 2013, pp. 754–5.
- <sup>507</sup> Jaaskelainen testimony, March 8, 2013, p. 877.
- <sup>508</sup> Monroe testimony, March 8, 2013, pp. 762–3.
- <sup>509</sup> Monroe testimony, March 7, 2013, p. 630.
- <sup>510</sup> Monroe testimony, March 8, 2013, pp. 814–5.
- <sup>511</sup> Monroe testimony, March 8, 2013, p. 827.
- <sup>512</sup> Monroe testimony, March 8, 2013, pp. 696–7.
- <sup>513</sup> Exhibit 1973; Monroe testimony, March 8, 2013, pp. 692–7.
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- <sup>515</sup> Monroe testimony, March 8, 2013, pp. 706–8.
- <sup>516</sup> Monroe testimony, March 7, 2013, pp. 635–6.
- <sup>517</sup> Monroe testimony, March 8, 2013, pp. 732–3.
- <sup>518</sup> Monroe testimony, March 8, 2013, pp. 683–4.
- <sup>519</sup> Monroe testimony, March 8, 2013, p. 685.
- <sup>520</sup> Monroe testimony, March 8, 2013, p. 787.
- <sup>521</sup> Monroe testimony, March 8, 2013, pp. 753–4, 796.
- <sup>522</sup> Exhibit 6-6; Pigeau testimony, March 22, 2013, p. 2542.
- <sup>523</sup> Pigeau testimony, March 22, 2013, p. 2545; Exhibit 6-6.
- <sup>524</sup> Pigeau testimony, March 22, 2013, pp. 2546–7; Pigeau testimony, March 25, 2013, pp. 2757–8.
- <sup>525</sup> Pigeau testimony, March 22, 2013, p. 2547.
- <sup>526</sup> See Exhibit 6-8.
- <sup>527</sup> Pigeau testimony, March 22, 2013, pp. 2539–40.
- <sup>528</sup> Pigeau testimony, March 22, 2013, pp. 2546–7; Pigeau testimony, March 25, 2013, pp. 2757–8.
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- <sup>531</sup> Pigeau testimony, March 22, 2013, p. 2549.
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- <sup>533</sup> Pigeau testimony, March 25, 2013, pp. 2836.
- <sup>534</sup> Burling testimony, April 2, 2013, pp. 3781–2.
- <sup>535</sup> Burling testimony, April 2, 2013, p. 3927.
- <sup>536</sup> Burling testimony, April 2, 2013, pp. 3791–2 in reference to Exhibit 6-6.

- <sup>537</sup> Burling testimony, April 2, 2013, pp. 3794, 3804–5.
- <sup>538</sup> Burling testimony, April 2, 2013, pp. 3799–3800.
- <sup>539</sup> Burling testimony, April 2, 2013, pp. 3916–18.
- <sup>540</sup> Burling testimony, April 2, 2013, p. 3916-18.
- <sup>541</sup> Burling testimony, April 2, 2013, p. 3810.
- <sup>542</sup> Burling testimony, April 2, 2013, p. 3944.
- <sup>543</sup> Officer testimony, April 22, 2013, pp. 6041–2.
- <sup>544</sup> Pigeau testimony, March 25, 2013, pp. 2768.
- <sup>545</sup> Pigeau testimony, March 25, 2013, p. 2769.
- <sup>546</sup> Pigeau testimony, March 25, 2013, pp. 2756.
- <sup>547</sup> Pigeau testimony, March 25, 2013, p. 2762. The power to demolish is a reference to section 9.9(d)(i) of the Property Standards By-Law: Exhibit 6-6.
- <sup>548</sup> Burling testimony, April 2, 2013, pp. 3813–4.
- <sup>549</sup> Officer testimony, April 22, 2013, p. 6046.
- <sup>550</sup> Pigeau testimony, March 25, 2013, pp. 2801–4.
- <sup>551</sup> Pigeau testimony, March 22, 2013, p. 2553.
- <sup>552</sup> Pigeau testimony, March 22, 2013, p. 2554.
- <sup>553</sup> Pigeau testimony, March 25, 2013, pp. 2838–9.
- <sup>554</sup> Pigeau testimony, March 25, 2013, pp. 2556–7, 2848.
- <sup>555</sup> Pigeau testimony, March 22, 2013, p. 2557.
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- <sup>566</sup> Pigeau testimony, March 22, 2013, p. 2566.
- <sup>567</sup> Pigeau testimony, March 22, 2013, p. 2566.
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- <sup>571</sup> Pigeau testimony, March 25, 2013, pp. 2796–7.
- <sup>572</sup> Pigeau testimony, March 25, 2013, pp. 2796–7.
- <sup>573</sup> Pigeau testimony, March 25, 2013, p. 2677.
- <sup>574</sup> Pigeau testimony, March 25, 2013, p. 2707.
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- <sup>576</sup> Exhibits 277 or 1855; Pigeau testimony, March 22, 2013, pp. 2571–2; Pigeau testimony, March 25, 2013, p. 2755. See, also, Exhibit 3145.
- <sup>577</sup> Exhibit 3145.
- <sup>578</sup> Pigeau testimony, March 22, 2013, pp. 2574–5.
- <sup>579</sup> Monroe testimony, March 8, 2013, pp. 823–4.
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## 1986–9: The first years of Rod Caughill's employment by Algocen

### Rod Caughill learns of the leaks soon after being hired

Rod Caughill joined Algocen on January 26, 1986, as construction superintendent. At the time of his testimony, he was still with the company (today called Algoma Central Properties Inc.) in the position of development supervisor.<sup>1</sup> Before joining Algocen, Mr. Caughill had worked for 16 years in general construction, ending up with a focus on air-leakage control, caulking, and air-penetration issues.<sup>2</sup> He was a key player with Algocen during its ownership of the Mall and an important witness, given his familiarity with repairs made to the roof and Algocen's overall approach to the problem.

Elliot Lake's population had peaked at about 20,000 in 1980 and was starting to decline by 1985, as a result of a negative trend in the area's mining industry. George Farkouh, a councillor at the time and later mayor, said that employment was "steady and declining slightly," but he felt the commercial vibrancy of the community was "reasonable" in 1985. The arrival and departure of residents was neutral, but in terms of the community's future "you started to see the decline very slowly."<sup>3</sup>

Mr. Caughill replaced Ward Pinnell, but the two worked together for about three months before the latter's departure.<sup>4</sup> From the start of his employment with Algocen until the sale of the Mall to Retirement Living, Mr. Caughill generally reported to Robert Leistner (the Mall's general manager and later its vice-president) on matters related to the Mall.<sup>5</sup>

When Mr. Caughill first started with the company, Jim Willey was the general manager for the Algo Centre. Larry Liautaud took over that position in late 1987 or early 1988. Messrs. Pinnell, Willey, and Liautaud have all died.<sup>6</sup> Initially, Mr. Caughill's involvement with the Algo Centre was limited. Day-to-day affairs were the responsibility of the general manager for the Algo Centre (Mr. Willey, followed by Mr. Liautaud). However, from the time he started working for Algocen, Mr. Caughill was aware that the Mall had leakage problems which the company needed to get under control. At the time, Algocen's vice-president, Nicholas Hirt, was concerned about the leaks from a tenant perspective. As Mr. Caughill testified, "[It] was certainly an inconvenience to every tenant we had. And he was frustrated."<sup>7</sup> Mr. Caughill learned sometime during his internship that the roof had been leaking for approximately seven years before his arrival. During those years, Mr. Caughill went to the Mall at least once a month and observed that the Mall's roof leaked.<sup>8</sup>

### Mr. Caughill is asked to look for solutions

Eventually, Mr. Caughill was asked by management at Algocen to "think outside the box and start looking for some solutions" to what was at the time an ongoing and unresolved problem.<sup>9</sup> He therefore set out to tackle the problem and read different materials as part of that process, including the Harry S. Peterson (HSP) waterproof system proposal and a trade journal article in *Canadian Building* magazine, discussed in the previous chapter.<sup>10</sup>

The corporate knowledge relating to the HSP system did not appear to have been handed down from one employee to the next. The result was that Mr. Caughill had to do some "digging" before he was able to figure out the various components that made up the waterproofing system installed at the Mall.<sup>11</sup> Mr. Caughill testified that, over the years, by working on the roof and cutting down below the poured concrete, he was able to determine that a strip of sealant had been placed in the grout keys between the hollow core slabs, as shown in a change

detail.<sup>12</sup> In contrast, the original design called for a strip membrane to slightly span those grout keys.<sup>13</sup> He also learned from the original documents that the sealants on the roof had a lifespan of approximately 10 years and were “an on-going maintenance issue.”<sup>14</sup> During his attempts to gain an understanding of the waterproofing system, Mr. Caughill did not contact HSP’s David Monroe, who was involved in managing the installation process, although he believed that at some point in time either Mr. Willey or Mr. Liautaud may have contacted him.<sup>15</sup>

**Mr. Caughill recalled that, when he started with the company, the Mall’s parking lot had two barriers already in place to keep heavy trucks off the roof, one at the south ramp and the other at the north ramp.**

Mr. Caughill recalled that, when he started with the company, the Mall’s parking lot had two barriers already in place to keep heavy trucks off the roof, one at the south ramp and the other at the north ramp. The barriers were horizontal, located at the bottom of the ramps, approximately 7 feet high, and designed to pivot on one end so that they could open if necessary. The design was meant to allow only cars and light trucks access to the roof. If necessary, with a little effort, the barrier could be swung open to allow, for example, an ambulance to get by.<sup>16</sup>

Mr. Caughill was aware that cars used the roof as a shortcut. The cars would come up the north ramp, navigate around parked cars, and head back down the south ramp.<sup>17</sup> He did not himself observe speeding traffic, and heard no such reports. However, he did hear cars at night on the roof moving “a little faster than they should have been.” He didn’t notice that the traffic above caused vibrations, but he did notice that it would hit the catch basins (metal grates of the drains), and the noise would echo through the Mall structure.<sup>18</sup> He described certain traffic control measures taken on the roof in an attempt to change the pattern of traffic by putting barriers and cords and speed bumps in front of the ramps at both ends.<sup>19</sup>

Mr. Caughill’s recollection of snow removal was that the contractors were allowed to use a three-quarter-ton truck with a front-mounted blade on the roof, but they also used a small backhoe-type machine to get snow out of the corners and push it on to the ramps. Mr. Caughill suggested that the backhoe machine would have been only marginally heavier than the pickup with the blade.<sup>20</sup>

## **1987: Algocen develops a maintenance routine that includes daily checks for loose caulking and water-damaged tiles**

At the expiry of the HSP warranty, Mall management put in place a maintenance routine for the parking level. A document prepared in August 1987 by Mr. Willey, Project Maintenance Schedule – Algo Centre, contained a set of maintenance, cleaning, and repair instructions for the Mall as a whole, but also specifically for the rooftop parking lot. It included directions for daily checks to ensure that the rooftop barriers were closed. In May, the catch basins were to be cleaned of sand. In the spring, joints were to be repaired, if not done already, and staff were to “finish sealing remainder of parking deck.” In the summer, staff were to check and, if necessary, caulk all rooftop joints, vents, and drains. All potholes and cracks on the roof were to be filled.<sup>21</sup>

Mr. Caughill confirmed that the Mall maintenance staff had a list of tasks of this nature, which was modified as the use of the building changed. His recollection, though, was that the staff were expected to patrol the roof daily, looking for any area where the caulking may have torn loose and patch it immediately. Up until Algocen sold the building, this patching was something that needed to get done; otherwise, the leaks “would just get out of hand.”<sup>22</sup>

The same maintenance schedule contained a daily direction to “[r]eplace tile when damaged by water.”<sup>23</sup> Mr. Caughill said this was a reference to ceiling tiles and that it was not out of the ordinary to have to do this job.<sup>24</sup>



## 1988–9: The Library moves to the Mall, despite warnings about leaks

In 1989, the Elliot Lake Public Library became a tenant of the Algo Mall. Over the years, the Library would become one of the major trouble spots for leaks at the Mall. The Library, of course, was an important municipal institution; its perennial difficulties with leakage ought to have been a major concern.

The Commission heard evidence from two individuals about the decision in 1989 to move the Library from its former location to the Algo Mall. The first witness was Barbara Fazekas, the chief librarian. Ms. Fazekas moved to Elliot Lake in 1979 and initially worked at the high school library. She was then hired in March 1981 as the chief librarian for the Elliot Lake Public Library. She took some time off from 1983 to 1988 to have a family, then returned as chief librarian in July 1988. She continued in this role until June 2006.<sup>25</sup>

The second witness who spoke about the decision to move the Library to the Mall was George Farkouh. Mr. Farkouh was a councillor for the Town of Elliot Lake from 1985 to 1988. In 1988 he was elected mayor, a position he would hold for 18 years.<sup>26</sup> Mr. Farkouh was a long-time resident of Elliot Lake. His family came to Elliot Lake as Palestinian refugees when he was 12, and he attended elementary and secondary school there. He left Elliot Lake to obtain his undergraduate degree, a graduate degree in commerce, and an MBA, all from the University of Western Ontario.<sup>27</sup> He returned to Elliot Lake and, at various times, operated several businesses and taught at Sault College in Elliot Lake.<sup>28</sup>

As chief librarian, Ms. Fazekas acted as secretary and treasurer on the Library board.<sup>29</sup> Library boards in Ontario operate independently from the municipalities in which they are located. The *Public Libraries Act* states that the council of a municipality may establish a public library by by-law, and that the library “shall be under the management and control of a board, which is a corporation.”<sup>30</sup> Council appoints a library’s board members. In Elliot Lake, because of the size of the Library, the municipality handles the accounting and personnel functions. In addition, the employees of the Library were treated as Town or City employees subject to the municipality’s human resources policies.<sup>31</sup> (The Town of Elliot Lake became the City of Elliot Lake in 1990.)

A representative of council sat on the Library board,<sup>32</sup> and councillors who sat on the board at various times included Rosario Capillo, John Gale, Troy Speck (when he was deputy mayor), Ralph Primeau, and Cathy McTaggart.<sup>33</sup> Mr. Farkouh was on the board from December 1985 until late 1988.<sup>34</sup>

Ms. Fazekas explained that regular monthly board meetings were held from September to June. The Library board’s council representative usually attended these meetings; the other councillors made a point of attending the budget meetings.<sup>35</sup>

The Library’s funding came mostly from the municipality.<sup>36</sup> Its budget was set through a process that involved the submission of budget sheets to the town or City treasurer, who put the budget together for presentation to council. The amounts dedicated to each line item could change, so long as overall the Library came in at or under budget. The biggest expense was for salaries.<sup>37</sup>

On Ms. Fazekas’s return to her position as chief librarian in 1988, she became more involved in municipal affairs. For example, she went to some management meetings because her employees were considered municipal employees and were trained through the Town / City. She sometimes liaised with municipal staff through the chief administrative officer for Elliot Lake, sometimes through Daniel Gagnon (responsible for economic development and tourism), and, for a short time, through the director of parks and recreation. These people received her monthly reports, which were also given to the Library board.<sup>38</sup>

Before Ms. Fazekas’s return to work in 1988, discussions had already started about moving the Library from its location in a building near the centre of town at 1 Mary Walk. The facility was too small for the growing collection of books, the physical plant was not ideal, and it leaked.<sup>39</sup>

Minutes of a town council meeting on January 19, 1987, record a motion by Mr. Farkouh that authorized the preparation of a financial impact study on “the Zeller’s building versus a new building for new Library facilities.”<sup>40</sup> It was subsequently determined, with the assistance of the town’s engineer, Pamela Townshend, that no existing buildings were acceptable. At this point, to Ms. Fazekas’s knowledge, the Algo Mall was not being considered as a location.<sup>41</sup>

Ms. Fazekas was asked to sit on a selection committee to find an architect to build a new stand-alone facility. Before her return in July 1988, an architect was hired. Ms. Fazekas met with the architect, and plans for a new facility were drawn up. The Library board approved the architect’s plans in late fall 1988.<sup>42</sup> However, when the plans for the new Library were submitted to council in late 1988, it was decided that, owing to a lack of funds, the project could not go forward.<sup>43</sup> The cost for the new Library would have been in the millions of dollars at a time when the town debt was approximately \$14 million.<sup>44</sup>

Elections took place in November 1988. Mr. Farkouh defeated the incumbent mayor, Roger Taylor, and in December 1988 was sworn in.<sup>45</sup>

The new council was in place to assume its functions in January 1989. In early 1989, Mr. Farkouh (now mayor) invited Mr. Liautaud, the Algocen manager, to a Library board meeting and advised that City Council had decided to move the Library into the Mall. According to Ms. Fazekas, the board was very concerned about the move. One of the concerns with the Mary Walk location was that it leaked, and yet the proposed new location was the Algo Mall, also known to have problems with leaks.<sup>46</sup> The board’s preference was to not move into the Mall. However, according to Ms. Fazekas, the City provided the funds and therefore made the final decision,<sup>47</sup> despite the fact that the Library board was technically and legally independent of the City.<sup>48</sup> If the decision had been left to the Library board, Ms. Fazekas believed, the Library would never have moved to the Mall.<sup>49</sup> Even though the new lease was signed by Janet Taylor, Library board chair, and witnessed by Ms. Fazekas, Ms. Fazekas made it clear in her evidence that she thought the real decision to move to the Mall was made by the City.<sup>50</sup> (The *Public Libraries Act* provided then, as it does now, that both the city and the board had to agree – the board is authorized to buy or lease land with the consent of the municipal council that appoints its members.<sup>51</sup>) The Library was to serve as an anchor tenant at the Mall (occupying 8,500 square feet), with a 20-year lease.\*

Mr. Farkouh painted a different picture of the situation and testified that it was the Library board’s decision to move to the Mall.<sup>52</sup> He did agree, though, that he was involved in the discussions about the Library’s location because the mayor and council were ultimately responsible for the Library budget. Mr. Farkouh testified that he did not encourage the move to the Mall, but instead “supported their decision to go into the Mall and I thought it was a good decision for the community and for the Algo Centre Mall.”<sup>53</sup> He agreed that the move represented a vote of confidence for the Mall, which at that time was having difficulties attracting long-term major tenants. The Library filled that gap.<sup>54</sup> He felt at the time that it was good for the community to have an economically sustainable mall. Mr. Farkouh indicated that, aside from the mines, the Mall was probably the largest commercial property taxpayer in town.<sup>55</sup>

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\* Fazekas testimony, March 11, 2013, p. 1119; Fazekas testimony, March 12, 2013, p. 1292. Ms. Fazekas understood that the lease needed to be for 20 years as a condition precedent to Province of Ontario funding for renovations. Those funds apparently came with a requirement of stability and longevity for the leased premises in question. Mr. Farkouh was not asked directly about provincial funding for the move, but he pointed out that, at the time of the move, Elliot Lake’s City Council had set aside approximately \$700,000 for the Library relocation. That amount, he said, did not come from any provincial source but rather was meant for either a new library building or its relocation: Farkouh testimony, May 2, 2013, pp. 7931–2.

Ms. Fazekas recalled that at the meeting with Mr. Liautaud and Mr. Farkouh, the Library board had expressed concerns about the leaks at the Mall, but the board was given assurances from Mr. Liautaud that the leaks were, or would be, fixed. This assurance from Mr. Liautaud about the leaks being remedied was confirmed in a letter from Ms. Taylor to Mr. Liautaud.<sup>56</sup>

Mr. Farkouh testified that he could not recall any assurances given to the Library board that the leaks would be taken care of at the time of the move.<sup>57</sup> He was as aware, however, “as any other member of the community, that it was common knowledge that the Mall did have leaks in it.”<sup>58</sup> Indeed, he was aware that the talk in the community of leaks at the Mall went back to shortly after the Mall opened.<sup>59</sup> His evidence, however, was that he did not believe it was common knowledge that the Mall leaked after every rainfall, that it leaked often, or that it leaked with greater frequency over the years.<sup>60</sup>

He testified that he did not recall specific problems with respect to leaks at the Library when the move to the Mall first occurred:

- Q. What – what was your and the City Council’s plan for dealing with the leaks in the Mall at the time the library moved in?
- A. I wasn’t aware of any. Neither, I believe, the City Council were aware of any leaks that were happening at the time that the library had been relocated to the Mall.
- Q. Sir, I believe you told me just a few minutes ago, that you, along with everybody in the community, knew that the Mall leaked.
- A. Generally did, yes.
- Q. So, what, if any, steps did the City take to deal with the leaks, as they may have affected the library at the time they moved in?
- A. I don’t think – from my memory, I recall any issues with leaks at the beginning of the move of the library.”<sup>61</sup>

Later in his testimony, Mr. Farkouh explained the distinction. He said that he would hear from different segments of the community that, from time to time, the Mall leaked in different areas and that it would be repaired; and so, indirectly, this information might indicate that the Library leaked.<sup>62</sup>

Mr. Farkouh’s testimony about his knowledge – and City Council’s knowledge – of the leaks at the Mall points inexorably to the City’s wilful blindness on this issue. The evidence of many witnesses made it readily apparent that this situation was a problem to be tolerated or even ignored entirely because the Mall was central to the financial well-being of Elliot Lake, particularly at a time when its debts had reached upward of \$14 million.

## **1989: Ken Snow is hired by Algocen as the maintenance supervisor for the Algo Centre and observes visible leaks**

Ken Snow was hired by Algoma Central Properties in 1989 and soon promoted to the position of maintenance supervisor for the Algo Centre. He remained in this position until 2005. He told the Commission that leaks in the Mall were visible from the outset of his job there. After it rained (one to two hours after a good storm), Mr. Snow said, the maintenance people would get calls from tenants. The staff would go to the various stores to put up pails and other devices to catch leaks, and then would go to the roof deck to try to find the source and do a “temporary patch.”<sup>63</sup>



The worst areas for leaks were the “high traffic areas” such as the entrances to the north and south ramps. Mr. Snow also testified that there were difficult leakage areas around Woolco, Scotiabank, and the Library (which he thought was the worst spot).<sup>64</sup> He said very few leaks occurred at the back parapet wall (the short wall around the edge of the parking space), since it was an area with little traffic.<sup>65</sup>

Mr. Snow believed that the barriers at the parking ramps did their job, and he recalled that oversized vehicles made it onto the roof on only a couple of occasions.<sup>66</sup> In terms of snow removal, he said, dump trucks were used, but they stayed on the ramps to receive snow from the roof.<sup>67</sup> A loader put the snow into the truck, but he never saw the truck on the roof.<sup>68</sup> At some point during his time at the Mall, one of the maintenance staff used a snow blower to remove the snow by the parapet wall to prevent snowplows from damaging the caulking in the corners.<sup>69</sup>

## 1990: The City is hit by mine shutdowns, the leaks persist, and the owner continues to deal with the roof in the same way

### The City suffers a significant blow

1990 was a very bad year for Elliot Lake. The same year Elliot Lake changed its status from a Town to a City,<sup>70</sup> the mines announced they would be shutting down. The shutdown would not be gradual; it would be brutally quick. Mayor Farkouh learned of the closures in early 1990, when two local mining executives visited his office.<sup>71</sup>

The population of Elliot Lake in 1986 was 17,894, of which 4,858 people were directly employed by the mines. With the announcement of the mine closures came a fear that the loss of this large number of jobs would transform Elliot Lake into a ghost town. By the end of 1990, the population stabilized at 14,300. There was a real concern about a devastating population decline at the time. Figure 1.5.1, which presents projections and statistics prepared for submissions to the provincial government, was referenced by Mr. Farkouh in a chapter he contributed to *Boom town blues*.<sup>\*</sup> Figure 1.5.2 shows the new targets based on projected economic diversification between 1985 and 1995.<sup>72</sup>

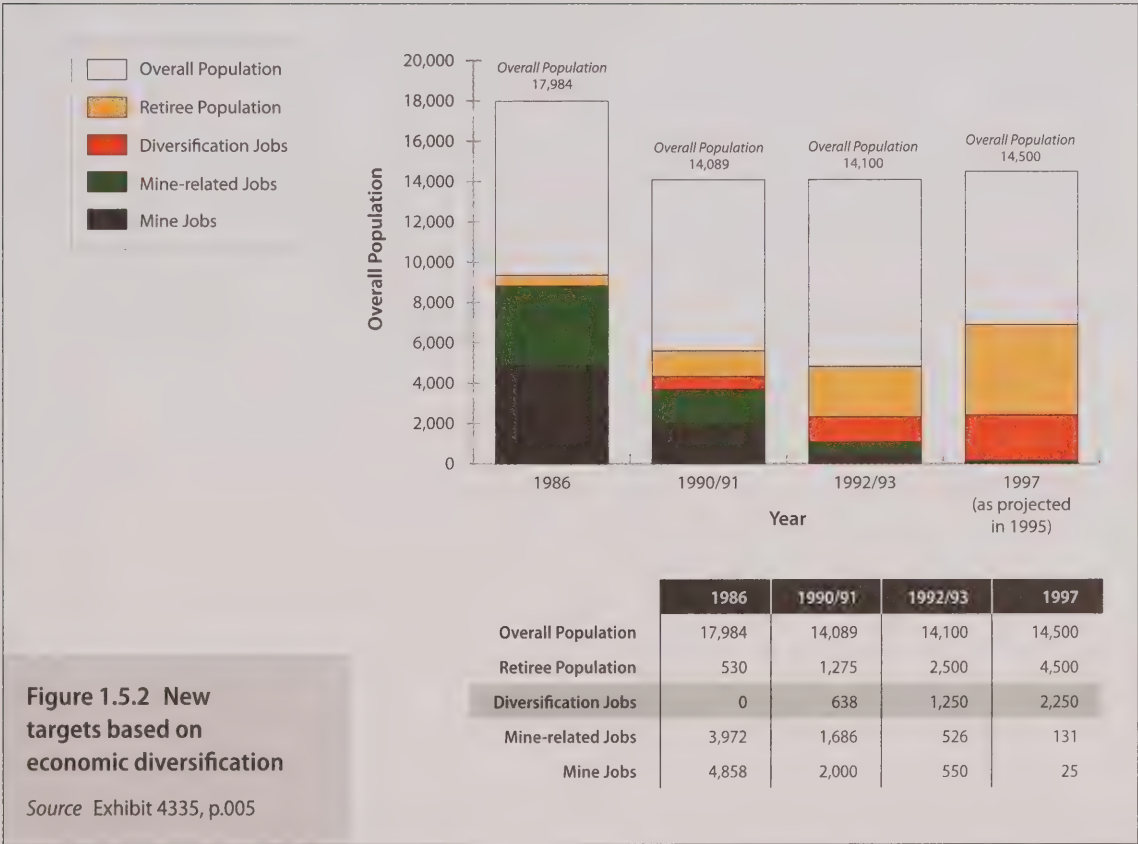
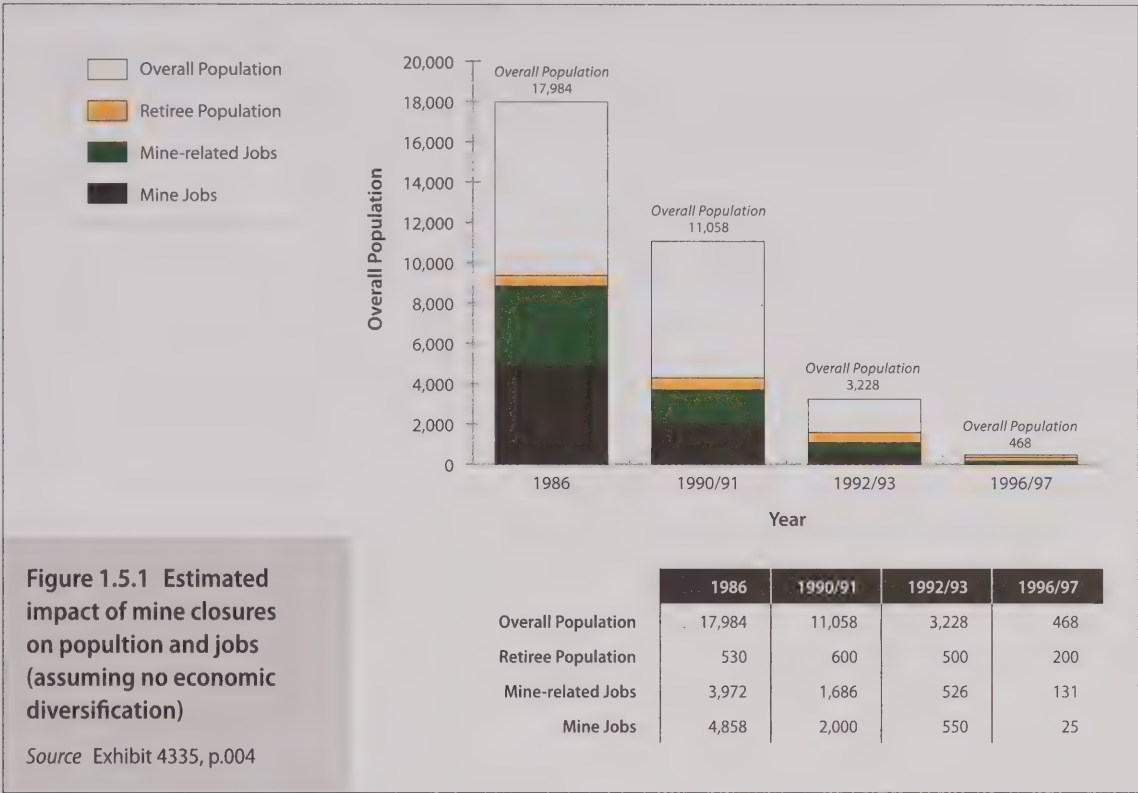
Mr. Farkouh testified to Elliot Lake’s difficulties at the time:

I saw this as a challenge and I was faithful and through the power of prayer and people supporting volunteers and government and others, that we would pull through this because it was a monumental task to be able to deal with the loss of an entire industry and – which, all in, was about 9,000 jobs.

To put that in perspective, in Ottawa that would be the equivalent of 300,000 job losses.<sup>73</sup>

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\* Farkouh testimony, May 7, 2013, pp. 8394–5; Exhibit 4335 includes excerpts from Anne-Marie Mawhiney and Jane Pitblado, eds., *Boom town blues: Elliot Lake, collapse and revival in a single industry community* (Toronto: Dundurn Press, 1999) Mr. Farkouh’s chapter 13 was entitled “Never say die: Seven years later, Elliot Lake enjoys new business and renewed optimism.”



## The Mall continues to lose money for Algocen

The Algo Centre was not a good investment for Algocen. It lost money every year but one from 1980 to 1990, for a cumulative loss over that period of \$9,825,986. Its losses in the three years 1988, 1989, and 1990 alone were more than \$3.2 million. The loss was caused by the interest charges on the capital borrowed to construct the building.<sup>74</sup>

## Algocen documents its roof maintenance procedures, which never changed

Algocen's process for repairing the joints on the roof remained the same throughout Mr. Caughill's involvement with the Mall.<sup>75</sup>

On August 16, 1990, Algocen prepared a document (which it kept in its records) entitled Procedures for Roof Deck Parking Repair, Algo Centre – Elliot Lake. The procedures called for Mall maintenance to remove old caulking in the crack-control joints, grind the concrete clean, prime it with THC 900 primer, mix THC 900 sealant with a hardener, pour it into the joint, let it set, and, "when THC 900 is set, seal roof with Chem-Trete BSM 40." The document warned against using any other products, but directed the use of Dymonic for temporary repair until the regular product could be applied.<sup>76</sup> Mr. Caughill explained that Dymonic was a caulking that adhered somewhat better than other products in wet weather, although no caulking ever really worked for long in wet conditions. Patching with Dymonic was a holdover method until the weather permitted use of the THC 900, a product with which Algocen had more success.<sup>77</sup>

Mr. Snow described essentially the same process for repairing the crack-control joints on the roof. He added a description of how, when putting in new caulking in the joints, he and his crew tried to keep the sealant below the surface of the concrete so the weight of vehicles didn't affect the joints and the snowplows didn't hook into the caulking. Mr. Snow stated that 60 percent of his staff's time was spent repairing roof leaks in the summer.<sup>78</sup>

The temporary patching, in wet conditions, involved two staff members sweeping water away from the joint, another using a torch to dry it, and a fourth to put in the Dymonic. No priming or grinding was done for these temporary repairs. Mr. Snow said that, if traffic was kept off the temporary patching, and perhaps with one or two more touch-ups, the repair might last until the weather warmed up in spring.<sup>79</sup> He added, though, that even the permanent repairs, made once the weather permitted, didn't last forever. Traffic would eventually undo their work, or the sealant would simply not adhere, a problem he attributed to powdery and/or spalling concrete in and around the joints.<sup>80</sup>

In the spring Mr. Snow and his crew would walk every joint on the roof, looking for damage. Using a map they would focus on areas indicated as priorities (according to the leaking that had been occurring inside).<sup>81</sup> Mr. Snow and his crew learned to do the roof repair work on the job. No engineers or others with technical expertise assisted, with the exception of representatives of the sealant suppliers who arrived at the Mall to provide some direction.<sup>82</sup> The staff members who worked on the roof were those tasked with performing general maintenance in the rest of the Mall. The Mall had its own janitorial staff. Over time, Mr. Snow felt some of the employees had become quite good at the roof repairs.<sup>83</sup> At times the amount of work to be done was too great, and Algocen hired outside contractors to do the repairs instead.<sup>84</sup>



Algocen also had a procedure for replacing cracked and flaking concrete at the joints, for checking the roof drains for leaks both within and around the catch basins, and for repairing cracks in the parapet wall.<sup>85</sup> Mr. Caughill testified that during his time with the Mall, Algocen never reapplied or replaced the caulking (sealant) under the concrete topping at the level of the hollow core slabs. This job would have involved chipping out the concrete topping above the grout keys. Although this idea was presented at some point, Algocen felt it would have been difficult to do and unsafe over an occupied space.<sup>86</sup>

Mr. Caughill testified that there were cracks in the concrete topping not located at the crack-control joints. The maintenance crew repaired these cracks by grinding them to a V shape (typically 3/4 inch wide by 1/2 inch deep) and cleaning, priming, caulking, and sealing them.<sup>87</sup>

As Mr. Snow testified, and I accept, these repair methods used by Algocen stayed the same, albeit with slight modifications and adjustments, from the mid-1980s through to the time Retirement Living sold the Mall to Eastwood in 2005.<sup>88</sup>

### **1990, A particularly bad year for leaks: Algocen is warned, and agrees, that the roof will “be a problem forever” – and continues to repair it in its usual way**

It is likely no coincidence that roof deck repair procedures were set down on paper in 1990, as this year corresponded with a particularly bad one for leaks.<sup>89</sup>

On February 12, 1990, the Ministry of Labour arrived to test the air quality in Woolco as a result of concerns raised by Barbara Cloughley (the store’s personnel manager) and others who were complaining of nausea, headaches, tiredness, and disorientation. Ms. Cloughley recalled that the test results showed “the air wasn’t the best but the recommendation for my office [from the Ministry of Labour] was to leave the door open all the time because it would be continually happening.”\*

A meeting about the leaks was held on May 30, 1990. Present were Messrs. Leistner, Caughill, and Liautaud, along with J. Campbell and H. Aho from Daybue Contracting, a firm Algocen had used on different occasions to repair the roof. A review of the roof at this time had led to the conclusion that the leaks were confined to the ends of the hollow core slabs (butt joints) over the steel beams.<sup>90</sup>

Mr. Caughill testified that, as of the date of this meeting, he did not have concerns about the structural integrity of the beams, although the effects of the water on the beams would have come up in conversation. The major concern at the time was the trouble the leaks were causing for the tenants.<sup>91</sup> Algocen, with the assistance of Daybue, sought to understand the cause. It concluded at the time that the barrier sealant was doing its job, so the source of the leaks had to be the caulked joints (i.e., the crack-control joints). The investigation led Algocen to the further conclusion that, although there was definitely some leakage at the crack-control joints along the length of the core slabs, the bulk of the trouble was at the butt joints over the structural steel beams.<sup>92</sup>

.....

\* Cloughley testimony, March 26, 2013, pp. 3192–3, 3206–17. The actual Ministry of Labour report, Exhibit 3268, was referred to during testimony. On p. 4, specifically referencing Ms. Cloughley’s office, it stated that “with the door closed, it does not benefit from the natural ventilation.” Ms. Cloughley felt this reference corroborated her recollection that she was told to keep her door open: Cloughley testimony, March 26, 2013, pp. 3216–17.

The butt joints were the joints between the hollow core slabs at their short ends.<sup>93</sup> The slabs there were not physically connected to the next set of 30-foot slabs,<sup>94</sup> and the only barriers to water penetration at these locations were the sealant at the level of the core slab and the backer rod and sealant at the level of the concrete topping. According to Mr. Caughill, no grout was installed between the slabs at the butt joints.<sup>95</sup> Mr. Caughill testified that it was concluded that the butt joints were the problem locations on the roof.<sup>96</sup>

Having spent many years working to stop the leaks through the rooftop parking deck, Mr. Snow believed that the leaks were caused by the caulking coming loose at the joints. He made no reference to the problems being limited to the butt joints.<sup>97</sup> Mr. Snow testified that the sealant in the joints would cease to adhere and, at times, could be simply pulled off by hand and replaced. He felt this problem was the main cause of all the leaks at the Mall.<sup>98</sup> The three expansion joints were also a source of trouble. The seal in the expansion joints would detach from the concrete on either side of the expansion joint. Mr. Snow recalled that all the seals in the expansion joints were replaced at some point during the time he worked at the Mall.\*

In May 1990, Algocen was continuing to try to solve the problem. The minutes of the May 30 meeting indicated that Mr. Campbell, from Daybue, had cut out and removed several areas of caulking, both at the butt ends and longitudinally. These joints were re-ground, primed, and re-caulked. The areas requiring work were “mainly in the drive aisles of the roof deck.”<sup>99</sup>

The repairs did not seem to be working or, at best, were not moving forward fast enough. On July 4, 1990, Woolworths’ real estate department wrote to Algoma Central Properties Inc. (Algocen Realty had changed its name by this time) about the Woolco store, complaining of recent major roof leaks: “You will note from previous correspondence that this has been an ongoing problem for the last couple of years, however, it has become worse.” The letter also stated that Mall management had promised repairs, but nothing had been done.<sup>100</sup>

Algocen wrote back on July 12, 1990:

[O]ur personnel have been diligently working on the roof leak problem since it occurred earlier this year. In addition to the patching of the roof joints, we are again examining if there is some undetermined reason which adds to the significance of the roof leaks this year, especially in light of the fact we spent an additional \$190,000 last year in the hopes of permanently solving the problem.<sup>101</sup>

Mr. Caughill said that, as a result of these concerns, Algocen prepared the August 1990 repair procedure. The Mall staff were directed to work on the roof daily. Mr. Caughill admitted that the 1990 repair procedure was merely an intensification of the same repair work Algocen had already been doing for some time. He indicated that he believed the \$190,000 referred to in the response to Woolworths was the cost of the work that had previously been done by Algocen’s maintenance staff and by Daybue. That work included the removal and replacement of caulking in the joints, the spraying of the roof with Barrier sealant, and related repairs. He could not recall whether repairs to the expansion joint counted in that figure.<sup>102</sup>

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\* Snow testimony, April 3, 2013, p. 3961. Mr. Caughill also indicated that the expansion joints were a recurring problem. His recollection was that Algocen replaced the major expansion joint at the escalator entrance twice because it had torn as a result of either traffic or faulty installation. His recollection, as well, was that the joint over Woolco was replaced twice. He did not believe that the third joint was ever replaced during the time that Algocen owned the Algo Centre: Rod Caughill testimony, March 13, 2013, pp. 1405–6; Rod Caughill testimony, March 19, 2013, pp. 1978–9.

In September 1990, Mr. Liautaud contacted Mid North Caulking and Installation Ltd. about performing repairs to the roof. The company wrote a follow-up letter that contained an unfortunately accurate prediction:

From our conversation on Friday it is apparent this roof deck will continue to be a problem forever, primarily due to (A) Sealant failure due to spaling [*sic*] concrete at the joint faces. (B) Continuous cracking of the surface slab at locations where cracking was not ment [*sic*] to occur [and] (C) sealant failure.<sup>103</sup>

Mid North believed it could greatly reduce or eliminate leaking through the proper application of THC 900 and provided a quote for its services.<sup>104</sup> Mr. Caughill agreed with Mid North's assessment that the roof was going to continue to be a maintenance issue and agreed with the reasons explaining why the deck was a problem.<sup>105</sup>

The expansion joints were also causing trouble in 1990. At some point in 1989, Daybue replaced the expansion joint seal over Woolco, but the leaking resumed almost immediately afterward. In November 1990, Algocen and Daybue discussed the problems with the new expansion joint. Daybue took the position that the failure of the expansion joint resulted from chipped concrete along the edges of the expansion joint, which it attributed to snowplow damage. Algocen disagreed that this was the cause, or the sole cause, and suggested that the concrete installed around the new joint might not have been sufficiently strong. Daybue also asked Algocen why the precast slab "bounced" at the expansion joint, perhaps implying that this movement was another cause of damage at the expansion joint.<sup>106</sup>

The flexing or bouncing of the hollow core slabs was another potential cause of roof leaks that Algocen was exploring around this time. Mr. Caughill looked at the structural details of the building to understand why the bouncing was occurring at the ends of the core slabs. He was never able to figure out the reason. He said that he still did not see any logical reason why they would vibrate in this manner, even though the slabs were not fastened at each end.<sup>107</sup> He did think, though, that this bouncing might have caused the caulking in the joints of the concrete topping to debond.<sup>108</sup> Mr. Snow also seemed to recall the slabs moving or flexing a bit at their ends, and he said that one could hear a thumping and feel movement above from joint to joint as the cars drove along the parking deck.<sup>109</sup>

**It seemed that, despite Algocen's increased efforts in 1990, the repairs were not working. The leak situation was getting worse, and the potential causes were multiplying. By the end of the year, Algocen had made the decision to seek the assistance of professional engineers.**

A roof survey dated November 29, 1990, reported some success with joint repairs. Joints that had been re-caulked over Woolco had not leaked since. Joints over the Library, however, had been re-caulked but were still leaking. The suggestion at the time was that the joints had not been dust-free when resealed by Daybue.<sup>110</sup> A leak was also reported from one of the drains near the Lotto booth in the area of the 2012 collapse.<sup>111</sup> It was noted that cracks were also appearing along the longitudinal lines of the core slab joints. These new cracks were not at the crack-controlled areas, but above the intermediate joints of the hollow core slabs<sup>112</sup> – another common problem, Mr. Caughill said, during his involvement with the Mall. By the time Algocen sold the building in 1999, more than 50 percent of the longitudinal joints without a crack-control joint had developed cracks on their own, and new V joints had to be created and sealed in those locations.<sup>113</sup>

It seemed that, despite Algocen's increased efforts in 1990, the repairs were not working. The leak situation was getting worse, and the potential causes were multiplying. By the end of the year, Algocen had made the decision to seek the assistance of professional engineers.



## **Algoma did not apply for, and the City did not ask for, building permits for any of the repairs**

Elliot Lake's Building Department continued to deal with Algocen from 1986 to 1990. This involvement appears to have related to building permits, fire safety issues, renovations, and similar issues. I saw no correspondence or other documentation that would indicate the town's involvement with the leaks at the Mall or with repairs related to those leaks.

There was evidence that suggested a tendency on the part of Algocen not to apply for building permits when they were required. Mr. Pigeau testified that this practice was his impression. He said that, on occasion, Algocen either forgot to or simply failed to apply to the Town / City for building permits and would need to be reminded. This oversight appears to have been connected to tenant fit-ups and related work. Mr. Pigeau could only speculate that it might have related to saving money, trying to circumvent the Code, or needing to be reminded.<sup>114</sup>

The fact that Algocen might not always have applied for building permits when it should have is relevant because Algocen likely should have done so when it replaced the major expansion joints on the roof. Rod Caughill testified that Algocen did not apply for a building permit to change the seals in the expansion joints because it did not view this work as falling within the definition of "construct"\* under the *Building Code Act*. Algocen also did not consider this work to be a "material change to the building or alteration," even though Mr. Caughill agreed the change affected an engineered product.<sup>115</sup>

Had Algocen applied for a building permit, the normal result would have been an inspection by the City's Building Department and recognition that the Mall needed repairs. Given the admissions by Mr. Pigeau of his awareness of the leaks and his concomitant regular inaction, one may justifiably suspect that, even if the permits had been obtained, it is unlikely that anything would have been done to enforce the needed repairs to the Mall.

## **Algocen gets advice from engineers but does not repair the roof**

### **Autumn 1990: Algocen seeks engineering advice on repairing the leaks and the state of degradation; it had concerns about structural damage from years of leaks**

Rod Caughill testified that the significant leaks in 1990 led to Algocen becoming frustrated. It did not know whether their repair methods were effective. "[W]e were looking for some guidance and some help," he testified.<sup>116</sup> It was his evidence that the company was concerned about the structure of the building, and particularly with whether any of the components "right from the steel up to the surface of the slab" had been degraded by the years of leaks. Algocen's concerns were with potential rust on the steel, the potential effect of

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\* "Construct" is defined in the *Building Code Act, 1992*, SO 1992, c 23, as meaning "anything in the erection, installation, extension or material alteration or repair of a building."

the salt-laden water on the concrete and the steel inside the concrete, and any freeze–thaw issues.<sup>117</sup> Algocen wanted to establish a “baseline” with respect to the condition of the building from this point forward. As Mr. Caughill testified:

Up until that point, we had no idea of how much degradation, if any, had taken place from 1979 until 1990. On a go-forward basis we wanted to be able to say that as of this date, this was the condition, and if it did change, we would just have something to reference to.<sup>118</sup>

### **January 1991: Trow is retained to provide a condition survey of the parking deck, told that Algocen had concerns about structural damage, and told to report on the structural integrity**

In October 1990, Rod Caughill contacted Trow Consulting Engineers Ltd., a multi-disciplinary engineering firm, seeking its assistance. Algocen understood that Trow had experience with parking structures over malls and other occupied areas and had done some engineering work during the initial construction phase.<sup>119</sup>

On October 12, 1990, Domenic Dell’Aquila, CET (certified engineering technologist), and Remy Iamonaco, P. Eng., from Trow responded in writing to Mr. Caughill’s inquiry, proposing a detailed condition survey of the Algo Centre parking structure. The survey was to be conducted and signed off by Trow’s structural rehabilitation division. Despite its title, that division, and Trow in general, did not have any structural engineers at the time.<sup>120</sup> Mr. Dell’Aquila, a CET (not a professional engineer), specialized in concrete restoration projects, parking structures, and concrete structures generally.\* Mr. Iamonaco was a civil engineer with experience in concrete technology, protection systems, and repair techniques.<sup>121</sup> In 1991, Mr. Iamonaco was manager of Trow’s structural rehabilitation division, which mainly dealt with the repair and protection of parking structures and bridge decks. Ninety percent of the group’s work at the time was on parking structures. A few of the structures they had worked on were over occupied spaces, but most were underground facilities.<sup>122</sup> Neither man had prior involvement with the Algo Centre.<sup>123</sup>

Trow was aware that the concrete topping had cracks and the caulked joints were failing. However, Mr. Dell’Aquila indicated that, although he understood going into the project that the building had a history of leakage, he was not aware that it had leaked from the day it opened and was not sure that he ever learned of this fact during his involvement with the Mall.<sup>124</sup>

In contrast, Rod Caughill believed that Trow understood that the leaks were a long-standing problem – despite the fact that, following the completion of construction and the opening of the Mall, Trow had no involvement with the leaks or the Mall until it was contacted in 1990.<sup>125</sup> Mr. Caughill did not, however, recall what he specifically told Trow about the leaks.

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\* Exhibit 33. Mr. Dell’Aquila was a certified engineering technologist, a status that could be obtained with a three-year degree in civil engineering and two years’ experience in the workforce. He was not a structural engineer, nor did he have special qualifications related to structural engineering and structural issues. From his start with Trow in 1981, through to 1990, he specialized in concrete restoration projects, parking structures, and concrete structures, generally. He was a member of the Ontario Association of Certified Engineering Technicians and Technologists, an organization with its own Code of Ethics and Rules of Professional Conduct: Dell’Aquila testimony, March 20, 2013, pp. 2076–8; Dell’Aquila testimony, March 21, 2013, pp. 2343–5; Exhibit 3143.

Mr. Iamonaco was originally a certified engineering technologist like Mr. Dell’Aquila, but in 1985, after taking additional courses, he became a licensed engineer. He worked with Trow until 2002. He is now vice-president with the Toronto Parking Authority, where he is in charge of the design, construction, and maintenance group: Iamonaco testimony, March 21, 2013, pp. 2439–40.

Mr. Dell'Aquila and Mr. Iamonaco proposed that the detailed condition survey include visual and sounding surveys, coring, photographs, and a formal report explaining the significance of Trow's findings and a comparative analysis of repair options and costs. The proposal included the statement that they had been told by Mr. Caughill that "the caulked joints appear to be failing and the suspended slab has had a history of leakage problems."<sup>126</sup>

Rod Caughill responded to Trow's proposal by a letter dated December 3, 1990, in which he said that Algocen was preparing to issue a purchase order for the project but that "there are, however, a few items we would like clarified before issuing this order." He wrote:

- 1) Along with the surveys, proposals and reports we are requesting definite repair recommendations. These should address both immediate repairs as well as any future considerations that may become necessary.
- 2) *As we have definite concerns respecting structural damage*, we would request that your inspections and subsequent reports address any conditions that may be the result of roof deck related problems.

...

*As you can no doubt appreciate, we have quite a problem with this uncovered parking deck which is also the roof assembly over our retail tenants. We have already expended substantial dollars on this structure and now turn to your firm for expert assessment and recommendations.*<sup>127</sup> [Emphasis added.]

On January 28, 1991, Algocen issued a purchase order to Trow, signed by Rod Caughill, which authorized expenditure of up to \$8,500 for a "Condition Survey" of the parking structure at the Mall, which was to "include but not be limited to" a number of items. The last-mentioned item was "Assessment of Structural Integrity, as Influenced by the Parking Structure Condition."<sup>128</sup>

Rod Caughill testified that when he referred to "structural integrity," he meant the ability of a building to support itself and any loads to which it may be subject. He agreed that if a building was unable to support those loads, you could have a catastrophic failure – a collapse.<sup>129</sup>

## April 1991: City knows of and receives a complaint of ongoing leaks at the Library and continues to do nothing

### Library complains of leaks to Algocen, mayor, council, and chief building official

On April 25, 1991, just one day after Trow's field visit to the Mall, Janet Taylor, chair of the Library board, wrote to Mr. Liautaud about the history of leaks in the Library since the move to the Mall. The letter was copied to the mayor and council, and to the City of Elliot Lake, including the chief building official, Mr. Pigeau. Ms. Taylor wrote:

The Library Board is very concerned with the continuing problems with the mall's roof, especially over the library location.

We do acknowledge and appreciate all of the efforts of yourself and the maintenance staff to date; however, we were assured that the problem had been rectified before the library even moved to the mall.

... Since the library opened in the mall, a major portion of the collection has had to be covered by plastic in order that the books are not damaged, the floor is littered with buckets, and many of the ceiling tiles are missing. The hoses which hang from the ceiling can be seen the whole length of the mall and negate any value which the art displays might contribute to the library's visual appeal.<sup>130</sup>



The chief librarian, Ms. Fazekas, helped draft this letter to Mr. Liautaud. She considered that it constituted a complaint.<sup>131</sup>

Mr. Liautaud wrote back to Ms. Taylor on May 7, 1991, with a copy to the mayor and council and Mr. Pigeau.\* Among other things, Mr. Liautaud wrote:

As you are no doubt aware, we had continuous problems until 1986, when after much examination we implemented a new maintenance procedure which worked consistently until the spring of 1990 with the exception of one major expansion joint which had to be redone in July of 1989. Apart from the latter, we also waterproofed the deck in 1989 for added protection.

Due to the large number of leaks which occurred in the spring of 1990, we redid 100% of the joints over the entire mall area, which, needless to say, did not fix all of the leaks. By the fall of last year after only marginal success, we conversed with a new consultant, Trow Consulting Engineers ... a plan was formulated and on their advice a multitude of testing should be completed in the spring of 1991 in order to determine a reliable recommendation. We therefore retained their services and scheduled April 15, 1991 as their commencement date ...

Please note that the pails, pans, hoses etc. as referenced in your letter are only there to minimize damage and leakage inconvenience until the problem is solved and by no means are a permanent solution.<sup>132</sup>

Ms. Fazekas provided vivid testimony about the difficult situation created by the persistent leaks at the Library in this time frame. She described how buckets and tarps needed to be brought out each time it rained, but the leaks were unpredictable. There were no windows in the Library, and at times the staff was unaware it had started to rain until the water started to come in. It rarely leaked in the section of the Library located under the Hotel. Leaks were frequent in the section of the Library directly under a high-traffic area for the parking lot above.† The staff had to cover this whole section of the Library virtually every time it rained (see fig.1.5.3).<sup>133</sup>



**Figure 1.5.3 (a) Buckets and tarps are used to catch leaks and cover large sections of books in the Library; (b) numerous tiles missing in the Library ceiling due to leaks**

Source Exhibit 11-74

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\* Mr. Burling assumed this letter would have come through his office first, but he did not recall seeing it or speaking to anybody about it: Burling testimony, April 2, 2013, p. 3825.

† Fazekas testimony, March 12, 2013, pp. 1144–7. See also Exhibit 2048, which is a diagram provided by Ms. Fazekas outlining the main areas of leaks in the Library. See Fazekas testimony, March 12, 2013, p. 1323, where Ms. Fazekas agrees that the library was located just where the ramp attached to the roof parking level, making it an “extremely high” traffic area.

Algocen staff confirmed Ms. Fazekas's evidence. Rod Caughill, for example, recalled the pans and hoses in place in the Library, as did Mr. Snow. Mr. Caughill acknowledged that the Library was a problem that needed a solution. Mr. Snow agreed it was a high-traffic area, where the leaks never stopped for long.<sup>134</sup>

### **Chief building official meets with Algocen – is told an engineer has been retained, and does nothing**

The City of Elliot Lake's chief building official, Mr. Pigeau, met with the Mall manager, Mr. Liautaud, on May 1, 1991, to address the concerns raised in the recent letter from the Library. Mr. Liautaud advised him that an engineer had been hired to analyze the problem and that a report was forthcoming.<sup>135</sup> Although Mr. Pigeau considered that the letter from the Library constituted a complaint in writing about the condition of the roof at the Mall, he felt the matter was being addressed when he learned that an engineer had been hired to analyze the problem.<sup>136</sup>

Mr. Pigeau gave inconsistent evidence about whether he followed up with the management at the Mall to obtain a copy of the Trow report. He testified that he asked Mr. Liautaud for the Trow report but did not receive it. However, he did not request it in writing and did not appear to have pressed the issue with Mr. Liautaud – or anyone else from Algocen – in order to obtain a copy. In fact, he said he did not “necessarily recall” Mr. Liautaud saying no to his request and could only guess at why he did not receive a copy. Throughout his tenure as chief building official, he never saw the Trow (1991) report.\*

Mr. Pigeau gave the astonishing evidence that it did in fact occur to him that he may not have received the report because Algocen had something to hide. Despite this concern, he still did not initiate a roof inspection or take any serious steps to attempt to obtain a copy of the report.<sup>137</sup> After having seen the report in preparation for his testimony before the Commission, he speculated that Algocen did not give him a copy because he would have pursued the matter and forced the company to spend the large amount of money set out in the first Trow report for the necessary roof repairs.<sup>138</sup>

It is unclear whether Algocen specifically withheld the Trow report from the City. Mr. Liautaud has died. Mr. Leistner testified that he did not know whether Mr. Liautaud had been instructed not to provide it and was not aware of any discussions between Mall management and Mr. Pigeau.<sup>139</sup> He also said there were never any internal discussions within Algocen about what would happen if the City's Building Department ordered the company to repair the roof. He agreed that if the Trow report or other similar documents had gone to the City, it might have forced Algocen to decide whether to repair, demolish, or close the Mall: “Well, I think it would make you make a decision. That's right. Don't forget we are ... dealing with an economic [sic] obsolete building ... it would just maybe make you go one way or the other quicker.”<sup>140</sup>

Mr. Pigeau did not perform an inspection, even though he knew the roof was not watertight over the Library. Nor did he follow up on Algocen's failure to provide him with a copy of the Trow report. He believed that to have done so would have been a duplication of efforts, given the retainer of Trow by Algocen. Mr. Pigeau testified that, if he had decided to inspect, he would have likely brought in a professional to assess the causes for the leaks;<sup>141</sup> and if he had seen the Trow report, which had found that the roof slab was inappropriate for achieving a watertight condition, he would have pursued the matter through the Ontario *Building Code* or the City's Property Standards By-law. He was vague and uncertain, though, as to how he would have gone about it. He might have issued an order under the by-law, or he might have checked with the *Building Code* Commission to see what else he could have done in terms of enforcement.<sup>142</sup>

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\* Pigeau testimony, March 22, 2013, pp. 2587–92. Mr. Burling was not aware that Mr. Liautaud had told Mr. Pigeau about the upcoming engineer's report: Burling testimony, April 2, 2013, p. 3824.

### **Mayor Farkouh claims not to have received the letter of complaint**

Mr. Farkouh, mayor at the time, denied receiving a copy of the letter from the Library. He stated that he was not aware that an engineer had been hired by the Mall, and he did not know about the state of affairs described in the letter, such as the buckets, missing ceiling tiles, and hoses. He was not in the Mall regularly in the 1990s, and he said he did not physically witness leaks himself.<sup>143</sup>

Mr. Farkouh testified that he was aware that it was common knowledge in the community that the Mall had leaks.<sup>144</sup> He heard from different sectors of the community that whenever there was a heavy rain there would be leaks in different areas of the Mall, and he accepted that this was the general understanding in the community.<sup>145</sup>

### **1990–2000: The chief administrative officer never raised the issue of leaks with the chief building official**

Fred Bauthus held the position of chief administrative officer for the City of Elliot Lake from February 1990 to July 2000, and he would hold it again from 2007 to 2010. The chief administrative officer is the senior official in the municipality, responsible for ensuring that staff implement the policies and directions of council, including delivery of services. All staff reported through him, and he in turn reported to council, albeit with the assistance of the various heads of departments. He also provided the council with expert advice in terms of the delivery of services.<sup>146</sup>

Mr. Bauthus also had no recollection of the 1991 letter from the Library.<sup>147</sup> He believed that it did constitute a complaint, and he would have assumed that it required investigation on the part of the property standards officer who became aware of it. He suggested that Mr. Pigeau did address it by “following up with the parties to see that they were working on that problem.”<sup>148</sup> However, his view was that if Mr. Pigeau had requested the engineering report and been denied, he would have expected the matter to be pursued further.<sup>149</sup>

During his tenure as chief administrative officer in the 1990s, Mr. Bauthus was aware of the leaks at the Mall, both at the Library and in other areas. During certain periods, he was in the Mall as often as once a day and went to the Library a fair bit.<sup>150</sup> He recalled seeing buckets collecting water from the leaks on some occasions, along with hoses to redirect water and tarps in the Library and elsewhere to protect books and merchandise. He could not say with any certainty whether there were times the leaks were worse than at other times during the 1990 to 2000 period, but he did recall that they had become worse when he returned to his duties as chief administrative officer in 2007.<sup>151</sup> Despite Mr. Bauthus’s awareness of leaks at the Mall, he did not raise the issue with the City’s chief building official.<sup>152</sup>

### **The Mall was important to the community, and the Library was important to the Mall**

When asked whether his failure to discuss the leaks with the chief building official related to the importance of the Mall to the community, Mr. Bauthus described the Mall as an integral part of the economic fabric of Elliot Lake. It was a shopping facility, a major centre, and a major source of employment. It was also integral to Retirement Living’s purposes, as that organization needed a major commercial centre in the City.<sup>153</sup> In short, the Mall was important to the community, and the Library was important to the Mall.<sup>154</sup> Furthermore, the Algo Centre, following the mine closures, was one of the largest, if not the largest, taxpayer in the City, contributing something in the order of \$500,000 in taxes per year.<sup>155</sup>



Nevertheless, Mr. Bauthus insisted that it was never “intimated or stated specifically” during the 1990s that the leaks at the Mall (and the Library in particular) should be treated differently because of the importance of the Mall to the community and of the Library to the Mall. There was “no direction or discussion on my part that we should treat the mall differently and I know I did not direct staff to do that otherwise.”<sup>156</sup>

### **The City’s inaction was not because of indifference**

The City’s laissez-faire inclination did not proceed from indifference. Quite the contrary. Although rarely explicitly stated, it is clear that any action forcing the owners to undertake meaningful remedial steps would have entailed the loss of a major source of employment, a major blow to tax revenues, and impairment of the City’s social hub. I suspect that the fear of that eventuality may have been the underpinning of the inertia that characterized official conduct at city hall over much of the Mall’s existence – from the 1980s as I have described through to the collapse. As I explain later, it would also have had a negative effect on Retirement Living’s bottom line: the commonality of interest between that organization’s and the City’s goals would, as we shall see, be of considerable consequence.

### **May 1991: First Trow report**

Trow conducted its fieldwork at the Mall from April 22 to April 24, 1991, and produced its report in May 1991. This was the first engineering report produced relating to the structural integrity of roof deck parking at the Algo Mall.<sup>157</sup>

As the engineer, Mr. Iamonaco was the principal in charge of the Algocen file and responsible for final review and approval of reports.<sup>158</sup> However, he did not actually go to the site in 1991, and he did not recall any prior discussion with Rod Caughill or anyone else from Algocen. He testified that he would have discussed the work beforehand with Mr. Dell’Aquila, taken phone calls during the process, and read and discussed the contents with him before signing off on the report.<sup>159</sup>

### **Inspection methods: Visual survey of accessible surfaces, sounding survey, concrete coring, and component inspection**

The authors describe the fieldwork they carried out, which included a visual survey, a sounding survey, coring and component inspection, and photographs.<sup>160</sup> The visual survey was of “accessible top surfaces” of the roof slab and pedestrian walkways, and observations of the soffit (underside) of the roof slab and pedestrian walkways for evidence of deterioration.<sup>161</sup> The sounding survey consisted of a random chain drag of the top surface of the concrete topping meant to detect hollow-sounding areas, which would indicate a debonding of the topping from the surface of the hollow core slabs. This task was followed by coring of the debonded areas to determine the cause of the hollow sound.<sup>162</sup> Trow took a total of 13 representative core samples, 12 from the top surface of the concrete overlay, plus another cutting through the full depth of the roof structure. This cutting was meant to allow it to determine construction details, chloride ion content in the concrete, and the condition of the top surface of the supporting steel beams.\* Photographs were taken throughout the process to document the condition of the structure.<sup>163</sup>

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\* Exhibit 35, pp. 5–6. Rod Caughill understood that the concern about chloride in the concrete related to the possibility that it might have penetrated the concrete and corroded the rebar (the ridged steel rod used in reinforced concrete): Rod Caughill testimony, March 13, 2013, p. 1521.

## Photographs and drawings of the Mall show Trow's observations

The 1991 Trow report included as an appendix a drawing it created to show the gridlines for the roof together with notations of observations. The drawing contained a legend with symbols for rust stains, leakage, leach stains,\* patching, cracks, spalls, and open spalls. The drawing set out the locations where these problems had been noted<sup>164</sup> and demonstrated that the cracking on the roof was widespread as of 1991.<sup>165</sup>

Trow also created a similar visual survey with legend for the soffit of the hollow core slabs that made up the rooftop parking deck.<sup>166</sup> It contained a legend with symbols for water stains, stains on the false ceilings, core locations, rust stains, drain locations, pail locations, metal pans, cracks, wall cracks, leach stains, missing fireproofing, pails above the false ceilings, and broken concrete.<sup>167</sup> The drawing contained indications of water and rust stains at locations throughout the Mall (other than under the Hotel), including almost every occupied space and almost every public space.<sup>168</sup> Mr. Dell'Aquila walked the entire second floor of the Mall to create this drawing, going above the ceiling tiles on numerous occasions. The drawing was indicative of widespread rather than isolated leakage.<sup>169</sup> Rod Caughill agreed that certain of the observations, by necessity, were made by looking above the ceiling tiles, such as the metal pans, missing fireproofing, and pails above the false ceilings.<sup>170</sup>

## Significant debonding of concrete topping, expansion joints, and crack-control joints; many random or unintentional cracks – further deterioration likely

The top surface of the concrete topping was “generally found to be in good condition.” This finding was made despite Trow noting that the rooftop parking exhibited some large areas of scaling, cracking, and broken and/or debonded repair patches. Trow also observed debonded joint sealant and many areas of debonded concrete topping along the sealed joints and expansion joints.<sup>†</sup> In total, it measured almost two-thirds of the “Primary Control Joints directly above steel beams,” which was a reference to the butt joints,<sup>‡</sup> and found 60 percent of the concrete along the primary control joints to be debonded. Approximately, one-fifth of the “Secondary Control Joints,” a reference to the longitudinal crack-control joints,<sup>171</sup> were sounded, and 23 percent of the concrete along those joints was debonded. One-third of the major expansion joints were sounded, and 100 percent of the concrete along them was found to be debonded.<sup>§</sup>

Trow also found approximately 864 metres of random or unintentional cracks in the concrete topping. These were observed to “coincide over the structural precast slab joints below the concrete topping as they are parallel to one another and are equidistantly spaced at approximately 1.2m.”<sup>172</sup> Thus, many of the new cracks in the roof were forming over the spaces between the precast slabs below, in the areas where HSP chose *not* to create crack-control joints.

Trow observed, as well, a “thin elastomeric membrane” in certain “localized” positions over the top surface of the concrete topping and caulked joint locations. It suggested this membrane was the result of a “previous attempt to protect that area from ingress of water.” The membrane was noted to be worn down.<sup>173</sup>

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\* A leach stain is white efflorescence, which Mr. Dell'Aquila described as the result of water mixed with salt making its way through the hollow core slabs: Dell'Aquila testimony, March 20, 2013, p. 2138.

† Trow also observed that the parapet wall along the perimeter of the parking structure showed cracks that were not considered structurally significant but required protection from water penetration: Exhibit 35, abstract. See, also, p. 7 of Exhibit 35 for the condition of the concrete topping in general.

‡ Dell'Aquila testimony, March 20, 2013, p. 2123. Mr. Dell'Aquila also clarified that the perimeter joints mentioned in the report were the joints butting up against either the parapet or stairwell walls: Dell'Aquila testimony, March 20, 2013, pp. 2123–4.

§ Exhibit 35, p. 7. Trow notes that, typically, the width of the debonded concrete topping over the control joints was 0.6 metres. The typical width of debonded concrete topping centred over the major expansion joint along Gridline 10 was 2.7 metres.

Trow noted the concrete topping around the drains on the parking deck to be “typically cracked, debonded and/or broken.” The drains were single level (i.e., capable of draining only surface runoff). The disadvantage of this type of drain, according to Trow, was that any water accumulating between the concrete topping and the precast structural slabs could drain only “through the de-bonded caulked joints or through cracks in the precast slabs and into the Mall.”<sup>174</sup>

The core samples taken in debonded areas revealed concrete deterioration at the bottom of the concrete topping ranging from 5 to 40 millimetres in depth. The majority of the cores showed little to no bond between the concrete overlay and the top surface of the precast slabs. The wire mesh reinforcement in the concrete topping was typically corroded. Trow also found two corroded pre-stressed cables, at depths of 75 and 150 millimetres from the top surface of the precast slab.<sup>175</sup> One core sample taken extended the full depth of the precast slab and exposed the top surface of the supporting steel beam. The surface of that beam was noted to contain surface rust.<sup>176</sup>

**... in addition to being debonded from the precast slab at many locations, the concrete topping of the roof slab was in an “initial state of deterioration” and that high chloride ion content in the concrete coupled with freeze–thaw action of entrapped water would “likely cause further deterioration to the concrete topping wearing surface.”**

Although Trow began its report by stating that the concrete topping was found to be in generally good condition, ultimately it concluded that, in addition to being debonded from the precast slab at many locations, the concrete topping of the roof slab was in an “initial state of deterioration” and that high chloride ion content in the concrete coupled with freeze–thaw action of entrapped water would “likely cause further deterioration to the concrete topping wearing surface.”<sup>177</sup>

Trow concluded that all three major expansion joints showed signs of leakage. The crack-control joints in the concrete topping were described as broken, leaking, and containing debonded sealant. Water was entrapped between the concrete topping and precast slab, the result of inadequate drainage and a lack of watertightness.<sup>178</sup> Cracks were noted in the protective nosings and the adjacent concrete topping along the east–west expansion joint by Woolco.<sup>179</sup> The east–west expansion joint in front of the Hotel and extending across the area above the Library was noted to have been caulked its full length. Mr. Caughill agreed that that meant the joint had somehow failed and caulking had been added to correct it.<sup>180</sup>

### **The parking deck slabs: Evidence of excessive leakage – continued leaks would cause increased deterioration**

Trow found that the soffit of the parking deck was generally in good condition, but then pointed to “evidence of excessive leakage through the joints of the precast hollow slabs above the mall level.”<sup>181</sup> It observed metal pans and pails above the false ceiling in stores “to divert the water leakage.”<sup>182</sup> Trow noted in particular that many leaks were occurring at the butt joints between the precast slabs.<sup>183</sup>

Water stains were noted on the underside of the exterior pedestrian walkway.<sup>184</sup> The exposed steel elements at the pedestrian walkway stairwell and slab soffit were rusted, and localized areas of broken concrete were noted on the soffit part of the slabs along the pedestrian walkway.<sup>185</sup>

Trow concluded that the soffit of the precast hollow core structural slabs showed numerous signs of leakage – mainly through the control joints and expansion joints, but also through some random cracks. Continued water and salt penetration, the report said, would cause increased deterioration of the concrete, the pre-stressed cables, the sprayed-on fireproofing, the false-ceiling tiles, and the electrical conduits.<sup>186</sup>



### **Steel beams: Surface rust and missing fireproofing from water damage, but no report on connections between beams and supporting columns**

Trow found that the other components of the parking structure (other than the suspended slabs) were in good condition, with a few exceptions, among them that many of the slab-supporting steel beams contained surface rust “at locations which coincided with leakage.”\* This conclusion was reached on the basis of visual observations alone.<sup>187</sup> Mr. Dell’Aquila testified that, if more serious rusting (typically evidenced by multiple flaking layers of rust) had been observed, Trow would have measured it, reported it, and recommended review by a structural engineer.<sup>†</sup>

Trow also noted that the fireproofing material on the steel beams at the majority of the leakage areas had debonded or completely fallen off.<sup>‡</sup> It also observed that many of the suspended ceiling panels and tracks were stained by water and/or rust, while certain electrical conduits were corroded from ingress of water and salt.<sup>188</sup>

The report was silent on the condition of the steel connections in the parking structure. Mr. Iamonaco agreed that they were an important part of Trow’s scope of work. He could not explain why surface rust on the steel beams was reported, but the condition of the connections unmentioned.<sup>189</sup>

### **Waterproofing design inappropriate**

Trow wrote: “It is our opinion that the design used for this roof slab is inappropriate in achieving a watertight condition over commercial areas.”<sup>190</sup>

### **Recommended repairs – install waterproofing membrane**

Trow recommended waterproofing and repairs to the “entire suspended levels.”<sup>191</sup> It presented two repair options. Both involved the installation of a type of waterproofing membrane over the whole of the parking deck. The first provided for the installation of a membrane above the concrete topping already in place, after making repairs to the topping. The second provided for the removal of the concrete topping and the application of the membrane, followed by the installation of a new asphalt wearing course on top. But before the waterproofing system was applied over the existing concrete topping, a review by a structural engineer would be needed to ensure that the roof could take the additional load.<sup>192</sup>

Trow recommended that Algocen proceed with option 2, citing certain difficulties with the waterproofing details that might arise with option 1. Trow also advised that there were risks associated with option 2; namely, the possibility that the removal of the concrete topping would cause further damage to the precast slabs.<sup>193</sup>

Trow also recommended a series of repairs to other components, including the removal of unsound concrete on the soffit of the slabs and patch repair in the context of installing a new waterproofing system.<sup>194</sup> It recommended installing new protective nosings at all expansion joint locations, and sealing the joints with a continuous rubber gland. It suggested installing new seals where the expansion joints met the parapet walls; repairing the perimeter and parapet walls themselves;<sup>195</sup> and installing bi-level drains for the present system – or

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\* Mr. Dell’Aquila explained in testimony that by surface rust, Trow meant that the beams were rusty but without loss of section. Loss of section means loss of thickness. He described what would occur with actual loss of section caused by rusting: “When you get loss of section, you get multiple flaking of layers of rust, and when you scrape that off, and then you measure it, you can see that there is loss of section or thickness of the member”: Dell’Aquila testimony, March 21, 2013, pp. 2239, 2241–2.

† Dell’Aquila testimony, March 21, 2013, pp. 2242–3. Mr. Dell’Aquila considered that a couple of millimetres would amount to loss of section: Dell’Aquila testimony, March 21, 2013, p. 2268.

‡ Exhibit 35, p. 9. In certain areas, such as the SAANS store, the beams were found never to have contained fireproofing.

possibly new drains, depending on the final grade of any new surface installed.<sup>196</sup> As well, Trow recommended cleaning the steel beams and applying a rust-inhibiting paint to all the beams and stairwell supports showing signs of rust, as well as replacing the missing fireproofing.<sup>197</sup>

### **Repair costs: \$1.26 million**

Trow estimated that option 2 would cost \$1.26 million, with an additional 10 percent allowance for the tendering process and contingencies. The cost estimate was broken down as \$1.1 million for the waterproofing, and \$160,000 for the recommended work to the expansion joints, perimeter and parapet walls, pedestrian walkways, and drains. This estimate did not include the cost of repairs to the electrical conduits, fixtures, ceiling panels, and tracks, or of the treatment of structural steel elements, including fireproofing. Nor did it include the cost of a structural engineer, if required.<sup>198</sup>

No cost estimate was provided for option 1.

Trow concluded its report by stating that additional and potentially significant costs could arise during repair as a result of "disruption of use to hotel guests, shoppers and others."<sup>199</sup>

### **Trow warns Algocen: Waterproof the slab to maintain its structural integrity, or suffer further deterioration and leakage**

Trow gave a specific warning in its report that deterioration and leakage would continue if the entire slab and expansion joints were not waterproofed:

Considering the above and due to the history of the leakage problems at this parking facility it is very likely that further deterioration and leakage will continue to occur if the entire slab and expansion joints are not waterproofed.<sup>200</sup>

It also recommended that all repairs, including the waterproofing, be carried out as soon as possible "in order to maintain the structural integrity of the slab and to reduce the potential for further deterioration, leakage and probably insurance claims for water damaged property inside the stores."<sup>201</sup>

Trow specifically explained how further deterioration would occur if the leaks were not stopped:

At the present time the chloride ion contents are high and the concrete topping is deteriorating. The precast hollow slabs are generally in good condition with the exception of the corroded pre-stressed cables found at core location No. 3. Since the roof slab is not protected with a waterproofing system, continued moisture and chloride ion penetration can be expected to further increase chloride levels with time (depending on the usage of the parking area) thereby initiating corrosion of the prestressed cables and deterioration of the concrete topping and precast slabs. A practical and cost effective solution would be to significantly reduce the penetration of moisture and chlorides into the concrete roof slab by installing an approved waterproofing system over the entire roof area including all expansion joints. *If this procedure is properly carried out before any further ingress of chlorides, the life of the roof slab would be significantly extended.*<sup>202</sup> [Emphasis added.]

Mr. Dell'Aquila and Mr. Iamonaco testified that it would have been premature at this stage to state in the report that continued deterioration would lead to collapse, although Mr. Dell'Aquila acknowledged in his evidence that, if the existing conditions were left long enough, there could potentially be a collapse. He testified that in 1991, when Trow reviewed the structure, this possibility was not an immediate concern and such a statement was unwarranted. The building was in an initial state of deterioration, but the situation was manageable. Mr. Dell'Aquila testified that although their report stated that the life of the roof slab would be significantly extended if the proposed procedure was carried out, Trow did not know how much longer the life of the roof would be extended if the owner followed its recommendations.<sup>203</sup>

## Summer 1991: Algocen's reaction to Trow's May report

### **Algocen doubts viability of Trow's waterproofing recommendation, asks why it cannot continue dealing with the roof as it had always dealt with it**

On June 11, 1991, Messrs. Leistner, Caughill, Liautaud, and Willey (then property maintenance superintendent and previously general manager of the Algo Centre) met at the Algo Centre to discuss the Trow report and view the structure at the same time.

The minutes state that "Trow proposal is not acceptable *carte blanche*."<sup>204</sup> Mr. Leistner indicated in his testimony that this reference was to Algocen's impression that neither option proposed by Trow was viable. His understanding was that option 1 involved putting too much weight on the roof, while option 2 eliminated the bonded concrete topping, which they understood was necessary for load purposes.<sup>205</sup> Rod Caughill testified that it simply meant that they were not prepared to go ahead with the full proposal – there were a lot of questions left unanswered.<sup>206</sup>

Those present also wished for greater clarification of Trow's assertion in the report that the life of the deck would be "significantly extended" if the recommended repairs were carried out. Mr. Caughill testified that Algocen wished to know whether it was a question of one year, 10 years, or 20 years.<sup>207</sup>

The minutes of the meeting show Algocen's collective understanding that the topping and the precast slabs were supposed to be bonded, except at the expansion joints, according to the HSP design.<sup>208</sup> The witnesses who testified to the knowledge and actions of Algocen could not explain why, as of 1991, the company had this belief about the limited capacity of the slabs without the bonded topping, or where or from whom it had obtained this information. Trow was not consulted on this particular question.

Rod Caughill's first reaction to option 2, which involved the removal of the concrete topping, was that it raised serious concerns because it seemed to be contrary to the design requirements of the building.<sup>209</sup> For this reason, Mr. Caughill did not think that Trow's proposal would work. He said it "flew in the face of what we had believed all along," namely, that a bonded concrete topping was essential.<sup>210</sup>

Rod Caughill appears never to have approached or questioned Trow in 1991 to obtain its perspective on whether the bonded concrete topping needed to remain in place. He believed that he did question Trow, but could not recall anything in writing and could not specifically recall having told Trow of his understanding, which he gleaned from the structural drawings, that the bonded concrete topping needed to remain in place.<sup>211</sup>

Those at the meeting also discussed whether it was feasible simply to repair the concrete and reseal the joints, as opposed to installing a new waterproofing system. The minutes state the following: "If we seal the concrete, bond the de-bonded areas and fill the joints, is this not equal to their #1 proposal? Why can't we seal the area?"<sup>212</sup> Despite the ample evidence that showed that sealing the concrete, repairing the debonded areas and filling the joints did not provide a watertight roof, Algocen appeared to want to continue with a system that had proven to be a failed experiment.

It may well be that Algocen was likely prepared to rely on, or accept, any explanation available to justify not proceeding with the very costly expense of installing a membrane. In addition to the cost of installing such a membrane, the work could also lead to business interruptions for the Hotel and Mall, as pointed out by Trow. This business interruption would have resulted in a potential loss of revenue, making Algocen a double loser (repair costs and lost revenues) if it had installed the membrane.



Mr. Dell'Aquila testified that in 1991 he believed that the concrete topping was not a structural requirement. This understanding was based on the structural drawings (S4 in particular), which showed insulation between the concrete topping and the hollow core slabs, and indicated to him that the concrete was not meant to be bonded.<sup>213</sup> (Trow knew from its inspection that the insulation was underneath and that the topping was bonded in at least certain areas.) It would have been necessary for Mr. Dell'Aquila to consult a structural engineer to confirm whether his understanding was correct.<sup>214</sup> Mr. Dell'Aquila testified that, based on what Trow eventually learned about the design of the building in 1995, the waterproofing option it had recommended in 1991, which involved removing the concrete topping, would not in fact have worked.<sup>215</sup> This evidence was given before Sonia Saari (the chief engineer of Coreslab, supplier of the hollow core slabs) testified that the topping was not required. As I have indicated, it is not necessary that I determine this issue. What is clear is that Algocen was told that a membrane could be applied.

Rod Caughill wrote to Mr. Dell'Aquila on June 27, 1991, asking a series of questions. The questions indicated that Algocen was leaning toward a course of action that involved patching and repairing the roof, or was at least contemplating such a course for the time being. Rod Caughill said Algocen was fairly confident that additional load could not be added to the building; Algocen needed to find something in the interim that might accomplish the same thing. He agreed that, essentially, Algocen was asking whether it could simply carry on doing what it had been doing all along.<sup>216</sup>

### **July 1991: Trow responds that a full waterproofing system is required; Algocen understands that this option is necessary to maintain structural integrity**

Trow wrote back on July 11, 1991, advising Algocen that replacing the debonded concrete and resealing the joints would amount to only a partial repair. A full waterproofing system was required.<sup>217</sup> It was clear to Rod Caughill that the degradation so far was not significant, but a full waterproofing system was necessary to prevent further degradation and maintain the structural integrity of the deck in the future.<sup>218</sup>

Trow advised Algocen that option 2 would provide the best protection against water and chloride entry and would allow the slabs to last their design life.\* Trow provided more particulars about the recommended installation of an asphalt wearing course – among them a 3-millimetre-thick asphaltic protection board over the entire waterproofing membrane, with an additional two layers of asphalt on top, for a total minimum thickness of 100 millimetres with “final thicknesses to be dependent on loading restrictions on the suspended slab.” Joints were then to be formed in the asphalt surface “adjacent to walls, frames of drains and over all primary control joints directly above the supporting steel beams.”<sup>219</sup>

### **August 1991: Algocen attempts to get answers about roof load capacity from Mr. Kadlec and Coreslab**

Although the possibility was discussed, Algocen did not hire other engineers to assess whether Trow's asphalt waterproofing system was viable. Nor did it go back to Trow with specific questions about the loading and the bonded topping.<sup>220</sup> Rod Caughill testified that he felt he could not even entertain the concept of installing the full membrane until he had answers from John J. Kadlec (the engineer at Beta, the firm that carried out the Algo Centre's structural design).<sup>221</sup>

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\* Exhibit 420. Mr. Dell'Aquila and Mr. Iamonaco told the Commission that, although Rod Caughill was seeking an estimate as to the life expectancy of the precast panels, this kind of estimate was difficult for engineers to make. Saying that something would last its design life, however, was seen as sufficient information for someone with experience in the construction industry, as Rod Caughill was: Dell'Aquila testimony, March 20, 2013, pp. 2146–8; Iamonaco testimony, March 21, 2013, pp. 2474–6, 2480–1.

On August 14, 1991, Rod Caughill wrote to Mr. Kadlec about “continual problems with the roof deck.”<sup>222</sup> He stated in the letter that his company was “faced with having to make some serious decisions as to methods of repair,” and asked Mr. Kadlec to advise on:

1. The designed load capacities.
2. Maximum allowable loads on the existing structure.
3. How critical are the components in the composite slab.
4. How adverse [*sic*] is any “debonding” of the slab from the precast panels.
5. Can the structural steel members take an additional load – if so, how much?
6. Any other pertinent information you can provide either on the structure itself or on alternate repair methods.<sup>223</sup>

Rod Caughill was looking for quick responses to these questions from Mr. Kadlec, and he communicated with him or attempted to follow up on answers over the next two months.<sup>224</sup>

It is unclear what Mr. Kadlec understood about the nature of the problem faced by Algocen. He testified that he had no idea why the information (other than the contents of Rod Caughill’s letter) was being sought and said he was not even aware that the roof had continued to leak all those years. He had not been involved in the installation of the waterproofing system.<sup>225</sup> Furthermore, it was clear from his testimony that Mr. Kadlec’s memory of the events was not good and he had some difficulty expressing himself in English. Mr. Kadlec believed from the content of Mr. Caughill’s letter (and presumably the additional communication from Mr. Caughill) that he should contact Coreslab to further investigate the load capacity and whether additional load could be added. Although the composite slab had not been part of his mandate during the construction phase, he seems to have understood that Algocen was trying to fix the leaks and was wondering whether the installation of a composite system meant additional load could be added.<sup>226</sup>

It would take Mr. Kadlec more than a year to respond. He testified that he needed to obtain information from Coreslab about the load capacity of the slabs, and that he had difficulty contacting David Hellyer, the original Coreslab engineer, who had moved to Oklahoma.<sup>227</sup>

## September 1991: Algocen considers options for Algocen – continue as is, sell it, or abandon it

On September 19, 1991, R.G. Topp, the vice-president of finance of the Algoma Central Corporation, sent a memo to Mr. Leistner:

PRC [Peter Cresswell, the CEO] asked that we brain-storm regarding options for Elliot Lake. I believe they are:

1. Continue operating the property. We are better off doing so as long as it generates positive incremental cash flow (after any negative deferred income taxes).
2. Sell the property. We are better off doing so if the selling price exceeds the discounted future incremental cash flow.
3. Worst case, abandon the property. We might do this if (a) ACP Inc. could do so without retaining any legal liability for the property, (b) it generates negative incremental cash flow and (c) there is no buyer at any price.

The above is elementary. I see no magic. The question is, What does the future hold for Elliot Lake?<sup>228</sup>

Mr. Leistner testified that underlying this memorandum were two things – the mine closures in Elliot Lake, which led to uncertainty about its economic outlook; and the national recession at the time, which “hammered the retail sector, very, very bad.”<sup>229</sup> He discussed many times with Mr. Topp and Mr. Cresswell the issue of what to do about the Mall. When asked what, from his point of view, was the upside of keeping the Mall, he testified: “I don’t know if there was an upside to keeping it.”<sup>230</sup>

### **Algocen does not change the method used to deal with the roof**

Rod Caughill testified that in 1991, 1992, and 1993, Algocen did nothing to make the repairs recommended by Trow, other than to refine the products used and slightly modify the repair method.<sup>231</sup> Despite the warnings it had received from Trow, Algocen did not change the way that it dealt with the roof. As Mr. Caughill testified, “[W]e were maintaining the system as best we could.”<sup>232</sup>

Mr. Snow testified that the techniques used to repair the leaks did not change over the 16 years he worked at the Mall (1989 to 2005), although he thought that, with time, he and his crew got better at pinpointing the source of leaks.<sup>233</sup> During the Algocen years, he considered that the leaks were under decent control but they “never completely stopped, that’s for sure.”<sup>234</sup>

**... Algocen did nothing to make the repairs recommended by Trow, other than to refine the products used and slightly modify the repair method. Despite the warnings it had received from Trow, Algocen did not change the way that it dealt with the roof.**

Mr. Snow described the procedure in the following way. As soon as the deck was bare of ice and snow in late winter or early spring, the maintenance staff would begin to walk the roof and make temporary repairs to joints where the sealant had come loose. The worst time for leaks was in spring, when the temperatures rose above zero. The snow would melt, and the rain would fall, but it was difficult to do any proper repairs because the water and temperature negatively affected the adhesion of the joint sealant; consequently, any attempts to fix the leaks in spring were temporary. By May or June, as the sealant was applied to bad areas, the number of leaks would start to diminish. Throughout the summer, when conditions were better for sealant adhesion and precipitation decreased, the leaks lessened. In the summer months, the maintenance staff spent 60 percent of their time repairing the roof to protect against leaks. Between August and December, the leaks would not necessarily increase unless there was specific damage somewhere. There was always a leak somewhere if it was raining, but from August to December the number of leaks would diminish to almost none.<sup>235</sup>

Rod Caughill testified that, where the job was small (5 to 6 square feet), Mall maintenance staff repaired the debonded concrete identified by Trow; where it was larger and required a concrete pour, outside contractors did the job.<sup>236</sup> It was a labour-intensive process. The concrete required 28 days to cure (harden). During the first few days after the concrete pour, the staff had to keep the concrete moist so it wouldn’t dry too fast and crack. Once the new concrete had cured, it would shrink, resulting in new cracks developing around the perimeter of the new concrete (where new met old). As a precaution to prevent water from entering in this area, these cracks would be sealed. It would appear that the replacement of debonded concrete ended up creating new potential sources for leaks.<sup>237</sup>



Over time, Algocen noticed that the V form of the crack-control joints became larger as a result of the need to grind the concrete in the joint (to roughen the surface in order to obtain better adhesion of the sealant in the cracks). On occasion, Algocen had to use backer rods (a foam cylindrical rod) in the cracks to achieve the necessary two-sided, as opposed to three-sided, adhesion of the sealant.\* Two-sided adhesion provided greater flexibility, whereas three-sided was more prone to failure and leaks. New cracks would develop, and Algocen would seal those as well.<sup>238</sup>

## February 1992: Senior executives of Algocen recommend that the company sell the Mall for whatever price the market would bear

On February 3, 1992, Mr. Leistner sent a memo to Mr. Cresswell. He and Mr. Topp recommended selling the Mall for whatever it would fetch on the market. He discussed valuing the Algo Centre on the basis of the expected future cash flow, and then wrote:

Unfortunately, it is difficult for us to put any faith whatsoever in future cash projections when having to consider the effects of the following ‘what-ifs’:

- i) a further significant decrease in population
  - currently at 13,000 with over 60% of potential work force unemployed
  - exodus will occur if jobs become available in other parts of the country
- ii) loss of an anchor tenant
  - a decision to vacate is not necessarily based upon bottom line (e.g. distribution concerns)
- iii) an escalation in uncontrollable operating costs beyond a reasonable level
  - hydro increases already forecasted
  - significant property and business tax increases will most likely occur
- iv) unexpected capital costs
  - roof deck parking concern

Any or all of the above could happen at any time and would have a severe negative impact on future cash flows.

As the upsides (government initiatives and financially assisted projects) are very limited and we would not want to become adversely obligated to any of our agreement holders in the future, it appears warranted to consider the disposition opportunities of the subject property at whatever price the market will bear.<sup>†</sup>

Mr. Leistner insisted during testimony that, during the early 1990s, Algocen was earnestly looking for a repair solution for the roof leaks. The only problem was the company’s opinion at the time that the Trow proposal simply would not work.<sup>239</sup> The period was a difficult one, however, from a financial perspective.

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\* Rod Caughill testimony, March 19, 2013, pp. 1929–30. Mr. Snow testified that backer rod was used for pretty much all the “main joints,” but it is uncertain what he was referring to. In all likelihood, he meant the butt joints at the short ends of the hollow core slabs: Snow testimony, April 3, 2013, pp. 3972–3.

† Exhibit 427; Exhibit 403; Leistner testimony, March 27, 2013, pp. 3289–93. A draft memo from Mr. Leistner dated July 17, 1992, contains an estimate of the net book value of the Algo Centre as of December 31, 1991, of \$11,937,000. Mr. Leistner explained that this figure was the original cost of the project to date (i.e., the original cost of the building plus all capital additions to date minus booked depreciation). The net book value is based on the expected life of the building and would be zero at the end of the useful economic life of an asset: Leistner testimony, March 27, 2013, pp. 3302–3; Exhibit 403.

## Summer–Fall 1992: Algocen recognizes that it has to do something, but does nothing

### June meeting: “no question we have to do something (within our financial restrictions)” and must test structure to determine effect of leaks

A meeting was held on June 12, 1992, more than a year after Trow’s first report. In attendance were all the people from Algocen involved in the roof issue: Mr. Leistner, Rod Caughill, Mr. Willey, and William Egan, the company’s comptroller. Notes taken by Mr. Caughill at the meeting record a number of questions that needed to be answered, including whether the topping had to be bonded to the precast slabs in order to achieve the structural load requirement. The notes conclude with the following points, which Mr. Caughill testified were his attempts to reflect the consensus of the group:

- no question we have to do something (within our financial restrictions)
- all options must be evaluated and all non viable options eliminated.
- i.e. membranes, top coats, new roofs, etc.
- before we even look at an option, designed loads and load limits must be determined
- design for load req’ts must be determined
- Kadlec must be forced to respond to our specific questions at “end of the day” will probably require testing and reevaluation of load capabilities of structure because of age and degradation caused by the water leaks<sup>240</sup> [Emphasis added.]

Rod Caughill testified that “financial restrictions” related not only to the actual cost of repairs, but also to the additional business costs associated with moving tenants or shutting down business during repairs. This aspect, he said, could potentially have made the repairs non-viable.\*

Rod Caughill confirmed that the reference to what would be required at “the end of the day” meant that everyone in attendance agreed that this step needed to be taken in order to move forward, and that a determination of the cumulative effect of the continued water leaks on the structural capacity of the Mall needed to be made.<sup>241</sup> Mr. Leistner also confirmed that those present at the meeting “believed degradation was occurring, and that over time it would affect it [the Mall]. That was our ongoing structural concern.”<sup>242</sup>

Those within the Algocen organization clearly knew that the water leaks could affect, and quite possibly had affected, the structural integrity of the Mall. Despite this knowledge, no new steps were taken to stop the leaks and the structural damage.

In June 1992, while still waiting for answers from Mr. Kadlec and Coreslab, Rod Caughill did look for possible low-weight waterproofing membrane systems. He considered the options of either a Rub-r-Road asphalt-based overlay weighing approximately 18 pounds per square foot (psf) or the use of a Tremco product called TBS 950 as a poured on coating.<sup>243</sup> He agreed that these were both permanent, continuous membrane options, and that a continuous membrane appeared to be “not only our best option but probably our only option at that point.”<sup>244</sup> He still had concerns, though, that even a lightweight system would have exceeded the roof’s design limits as he understood them.†

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\* Exhibit 609; Rod Caughill testimony, March 13, 2013, pp. 1580–3, 1587–8. See, also, Exhibit 40. It appears that, in this approximate time frame, Rod Caughill also made contact with Mr. Monroe from HSP, who indicated that the concrete topping was necessary from a structural perspective. The Commission was not able to confirm whether Mr. Monroe in fact gave this advice.

† Rod Caughill testimony, March 13, 2013, pp. 1566–7. He did not recall any discussion about strengthening the structural steel, and he considered the option to be financially impractical or unfeasible, given that the building was occupied: Rod Caughill testimony, March 13, 2013, p. 1578.

Algocen considered other options to solve the leaks. One involved putting a roof over the entire parking deck. This idea raised a whole new set of problems. Algocen was certain, based on a review of the structural drawings, that the structural steel was not designed to take the additional load. The company also had concerns about snow load and removal on this type of roof. Important, as well, was that a new roof of this nature would have eliminated at least one-and-one-half levels of the Hotel. Algocen never sought the opinion of an engineer on this option, however.<sup>245</sup>

Rod Caughill also recalled discussions about banning parking outright on the roof but, because the roof represented such a large portion of the parking facilities, Algocen had nowhere else to put cars. Seventy percent of the Mall's parking was on the rooftop.<sup>246</sup>

### **June: Coreslab tells Algocen that concrete topping is theoretically required to provide support to 120 psf**

On June 29, 1992, Shahid Shaikh, a professional engineer with Coreslab, wrote to Rod Caughill to say that the concrete topping was placed to act compositely and was necessary in order to safely support a superimposed load of 120 psf:

As per my conversation with you this morning, the parking deck for the above mentioned project was designed using a superimposed live load of 75 pounds per square foot and a superimposed dead load of 45 pounds per square foot. Please note that for the slab to safely support this load, the three inch concrete topping which was placed was to act compositely with the Coreslab.\*

As discussed earlier in the Report, all the floors of the Mall were required by design to carry a superimposed load of 120 psf. The information provided by Mr. Shaikh in 1992 meant that the hollow core slabs installed to form the interior floors of the Mall did not meet the design requirements. A composite topping was installed only on the rooftop parking deck, increasing its load capacity to 120 psf, but a similar topping was not installed on any of the floors. Although I make note of this deficiency, ultimately the slabs did not fail. Consequently, I make no further comments or findings on this issue. The evidence of the consultants who inspected the Mall over the years, as detailed throughout the Report, was consistent in stating that the rooftop parking deck could accommodate the application of a thin membrane system. This advice was never followed by any of the owners.

Despite this opinion from Coreslab's engineer, Rod Caughill still wanted an opinion from Mr. Kadlec, the actual design engineer.<sup>247</sup>

### **July: Algocen discusses a potential sale and determines the Mall is worth less than it had been accounting for**

Mr. Cresswell accepted "as an option" the advice of Mr. Leistner and Mr. Topp to sell the Mall at whatever price the market would bear. Mr. Leistner testified that, although the company had not listed the Mall for sale, it was seriously considering any opportunities that came its way.<sup>248</sup>

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\* Exhibit 41; Exhibit 1927. The Commission did not hear evidence from Mr. Shaikh about how he reached this conclusion. A later conversation took place between Rod Caughill and Mr. Shaikh on July 16, 1992, in which Mr. Shaikh apparently provided additional information. First, Mr. Shaikh apparently advised that had 10-inch slabs been used instead of 8-inch, the bonded concrete topping would not have been necessary. Mr. Shaikh also advised that Algoma could remove the 3-inch topping and replace it with a 2-inch topping while achieving the same structural results. One inch of concrete topping was noted to create 12 psf of load. Rod Caughill was not asked about this particular interaction, however, and so it must be interpreted with caution: Exhibit 1835.



In July 1992, Algocen was considering negotiations to sell the Mall to a potential purchaser that had submitted a letter of intent. Mr. Leistner prepared a memo to Mr. Cresswell to provide advice about the potential selling price. Algoma's financial statements for the year ending December 31, 1991, listed a "Net Book Value" (the capital cost of the building and any additions, minus the accumulated depreciation from the date of construction) of \$11,937,000 for the Algo Centre. Mr. Leistner was of the opinion, however, that what he described as "significant concerns with respect to Elliot Lake and specifically the Elliot Lake operations" would have had a negative effect on the actual market value of the building. Those concerns were:

- (i) a further material decrease in population (eg. Rio Algom has contracts only to 1996),
- (ii) the City already has an 80% plus employment rate,
- (iii) the commercial rental competition is already fierce,
- (iv) the loss of an (Woolco) anchor tenant, and
- (v) the possibility of material capital costs expenditures (eg. roofdeck).<sup>249</sup>

Mr. Leistner advised Mr. Cresswell that sale negotiations should begin at \$7 million, but the company should not expect to receive that much.<sup>250</sup>

The difference between the value of the Algo Centre as shown on Algoma's financial statements and the actual value, as disclosed by the analysis Mr. Leistner conducted in July 1992, led to the company reducing (or writing down) the building's value in its 1992 financial statements by \$5.1 million. The financial statement indicated that this reduction had been done because "management believes there has been a permanent impairment in the value of these assets."<sup>251</sup> Mr. Leistner testified that the uncertainty of the situation on the parking deck was part of that analysis.<sup>252</sup>

### **September: Mr. Caughill interprets Mr. Kadlec's long-awaited response to mean that concrete topping is required to provide support to 120 psf**

After Mr. Kadlec finally spoke to Mr. Hellyer from Coreslab, he sent the following handwritten note to Rod Caughill at Algocen on September 17, 1992:

Finally, after so many month[s] of trying to get the answer from Coreslab Ltd. – the company [that] designed the precast system I got the answer today: "No more additional load (120 [psf] specified, can not be carried by the planks. However, I would recommend (if we need to add any additional load) to perform a load test."<sup>253</sup> [Underline in original.]

Mr. Kadlec testified that he did not respond to Mr. Caughill's questions about the composite slab or the load capacity of the structural steel because he felt the important question was whether the precast planks could take additional load.<sup>254</sup> Mr. Hellyer told him that the planks did not have that capacity.<sup>255</sup>

Again, I think what they wanted to do is to add concrete, I mean the weight to provide composite system floor. But the answer from them was no, they could not add any more load than what the planks were designed for.<sup>256</sup>

Rod Caughill interpreted Mr. Kadlec's response as saying that the composite slab was necessary, and the maximum load was 120 psf.<sup>257</sup> As he testified, "at that point we knew ... we had a very, very narrow window that we could add to that top deck, very small."<sup>258</sup>

## September: Algocen rejects advice to perform a load test to determine actual capacity of roof deck

A load test is performed by putting a precise load on the roof and measuring the “deflection” (the amount the deck moved below its original position) to determine how much more weight the slab could take. It would determine the actual capacity of the structure to carry a particular load, rather than the theoretical design capacity.<sup>259</sup> Mr. Kadlec suggested a load test, because he recalled such a test being done for a tenant of the Mall that required higher strengths than those shown on the drawing.<sup>260</sup>

Mr. Caughill admitted that, if a load test had been done, Algocen would have learned precisely what the structure, after all the years of water incursion, was able to support – what, three months earlier, he and his colleagues had said would be necessary “at the end of the day.” Despite Trow’s recommendations, and despite Mr. Kadlec’s advice, Algocen never conducted a load test. Nor could Mr. Caughill recall any discussion within the company about having one performed.<sup>261</sup>

## Algocen did nothing for three years after getting the 1991 Trow report

### Mr. Leistner could not explain why

Mr. Leistner was asked why, having received Trow’s opinion that a membrane was necessary and being uncertain whether it would work, Algocen did not go to another engineer, explain the company’s concerns, and ask for new advice. He did not give a clear answer, despite being given a number of opportunities. He was asked twice whether that decision had anything to do with the financial performance of the Mall. Twice he did not answer the question, saying that “we went to experts and we couldn’t get an answer on how to fix it”<sup>262</sup> and “with the economics at the end of the day, well, we didn’t have a viable option to look at.”<sup>263</sup> He gave the following evidence:

- Q. But, but Trow, in ‘91 said, “you have to have a membrane.” You wrote back and said “are you sure?” And they said, “Yes, we’re sure, you have to have a membrane.” And then, as you’ve just told me, for three more years you did not go to an engineer and ask them, “How do we do this? Do we have any other options? We’re not sure whether or not what Trow proposed would work.” That’s what happened, right?
- A. No, I think we – I think we were confident that Trow’s proposals wouldn’t work.
- Q. Then why didn’t you ask another engineer for another proposal?
- A. We didn’t have any idea on what to ask. We would go and ask the same thing and meet the same answer.
- Q. How – I guess I don’t understand that. The engineers were experts in how to fix the problem. You went to an engineering firm, asked them for a solution. They gave you what they felt was a solution. You weren’t sure it would work. My question to you is: Why didn’t you ask somebody else?
- A. We just never did. I can’t answer any better.<sup>264</sup>

Later, when asked whether discussions about the Algo Centre’s economic outlook affected the decision not to seek additional engineering advice until 1994, Mr. Leistner testified, “I don’t think so.”<sup>265</sup>

## Algocen could afford to fix the roof

Algocen’s decision to neither place a membrane on the parking deck as suggested by Trow in May 1991 nor seek other advice was not a result of the company’s having insufficient funds available. Mr. Leistner testified that, if the company wanted to spend money in the amount suggested by Trow, it could have.<sup>266</sup>

There is no doubt that Mr. Leistner's evidence was accurate. The financial statements of the consolidated group of companies owned by Algoma Central Corporation showed net income in 1991 of \$3,346,000; in 1992 of \$7,181,000; in 1993 of \$6,861,000; and in 1994 of \$14,438,000. Total assets at December 31, 1994, had a value of \$232,318,000, with long-term debt of only \$30,163,000.<sup>267</sup>

## **Trow conducts a second condition assessment in 1994**

### **Trow is asked to compare the conditions, including structural integrity, with what it found in 1991**

Algocen continued to have concerns about the condition of the parking deck, and in April 1994 the company wrote to Trow to request another inspection report.<sup>268</sup> Algocen wished to understand what, if anything, had changed between 1991 and 1994, and whether there had been further deterioration of the building. It also wanted to be aware of any future impact on structural integrity.<sup>269</sup>

Algocen requested that the scope of work include tests to determine the extent of degradation of the pre-stressed cables in the hollow core slabs, using previously tested areas for comparison. Cores were to be removed down to the steel beams in order to determine the extent of rust and deterioration; and a visual inspection of structural members (both steel and concrete) was to be conducted, with particular attention given to areas noted in 1991. Algocen also wanted a comparison of chloride with the 1991 levels.<sup>270</sup> Algocen was seeking to assess if and how the deterioration of the building, including the rust, had progressed between 1991 and 1994.<sup>271</sup>

### **Algocen is warned that corrosion will accelerate exponentially if leaks are not treated – and does not change the way it deals with the leak**

Trow conducted its on-site inspection of the building on August 23 and 24, 1994.<sup>272</sup> This time, both Mr. Iamonaco and Mr. Dell'Aquila attended on site, and Mr. Caughill was present with them during at least part of that time. A note prepared by Mr. Caughill after the inspection stated that

Iamonaco does not believe that we have a structural problem yet but he cautions that the corrosion seen will accelerate exponentially if the leakage is not treated.\*

Mr. Caughill testified that he understood Mr. Iamonaco to be indicating that, if Algocen did not stop the water from coming in, there would be a potential exponential increase in the effects of the rust on the structure. He understood that putting a membrane in place was "pretty much our only option that was available to us."<sup>273</sup>

Mr. Leistner was told of Mr. Iamonaco's comments. He testified that he understood from them that "we had to deal with the leakage issue as much as possible." He also understood that the way to deal with the leakage was to put a membrane in place.<sup>274</sup>

Despite the understanding of both men, between that time and when it sold the Mall in 1999, the company did not change what it had been doing on the roof.<sup>275</sup>

## **City continues to receive reports of leaks and does nothing**

On September 12, 1994, not long after Trow's August 23 and 24 site visits, Ms. Fazekas wrote to Mr. Bauthus to complain that tiles were dangling from the ceiling in the children's section of the library and the t-bars were

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\* Exhibit 611. The words are quoted from Mr. Caughill's document and cannot be attributed word for word to Mr. Iamonaco. Mr. Iamonaco, for his part, could not recall the details of the conversation and whether he in fact used the word "exponentially": Iamonaco testimony, March 21, 2013, pp. 2487–8.



loose. She worried that the ceiling tile apparatus may not have been properly installed and that the whole ceiling was in jeopardy. As she noted in her letter, she even called Mr. Pigeau directly:

My concern is that the rest of the ceiling is similarly attached and the whole ceiling is in jeopardy. When requested to determine the safety of the rest of the ceiling, the mall manager and maintenance staff rushed to tell me not to panic. I then called the City's Chief Building Officer for an opinion on the subject. Although he did visit the site to ensure that the ceiling damage was fixed, he did not share my concerns regarding the rest of the ceiling.<sup>276</sup>

Mr. Pigeau met with the librarian and made notes on a copy of the letter found in the City's files: "Barb Fazekas met with me to thank me for a quick response on the Algo Mall ... Met with Fred [Bauthus] and advised only that the gridline wall is a problem and that Algo Mall will repair if City agreed to lower catch basin on their property."<sup>277</sup>

Ms. Fazekas testified that the false ceiling was coming loose in this manner because of moisture that, as far as she could tell, was caused by the ongoing leaks. Her evidence was that she brought up the issue of the leaks with both Mr. Pigeau and Mr. Liautaud.<sup>278</sup>

Mr. Pigeau only reluctantly agreed that this ceiling tile issue related to the leaks. He recalled that the ceiling damage was fixed, and he did not pursue the matter further.<sup>279</sup>

Mr. Bauthus recalled this issue. The letter came across his desk and he gave it to Mr. Pigeau to act on. He, too, recalled that the ceiling tiles were fixed, but also agreed that this repair did not solve the ongoing issue with leaks; nor could he recall giving any direction to Mr. Pigeau.<sup>280</sup>

Mr. Pigeau testified that he was generally aware that the Mall was leaking during this time frame and that Mall managers were trying to remedy the problem. He knew Algocen had hired personnel to try to seal the roof itself and that the maintenance staff did a lot of work on the roof. He saw them up there from time to time, "applying a waterproofing compound of some sort, over top of areas that needed it."<sup>281</sup> He also knew that the Mall had hired people to do grouting between the slabs and the grates and wherever the concrete assembly might be failing or spalling, and that at some point in time the staff was working on the expansion joints.<sup>282</sup> However, based on the work he saw taking place on the roof, he did not ever require a building permit from Algocen.<sup>283</sup>

Throughout his tenure, Mr. Pigeau said, the mayor, council, or City staff never directed him on how to do his job and never interfered with the performance of his duties.<sup>284</sup>

Others within the City also had knowledge of the leaks at the Mall. For example, Larry Burling, the City clerk, described a conversation he had with Ms. Fazekas, likely at some point in the 1990s, although it may have been later. She spoke of the leakage problem at the Library, and Mr. Burling's advice was that the Library should simply rearrange the collections and computer systems to places that did not leak. Ms. Fazekas indicated to him that this solution was not possible because the staff never knew where the leaks would come in. Mr. Burling somehow took this remark as a sign that the Mall was working at fixing the problem:

So they are making some progress because they are plugging some things but obviously some new ones are occurring over time. So I wouldn't say that they didn't have some success. They took care of the immediate leaks, but new ones kept presenting themselves.<sup>285</sup>

Mr. Burling also agreed that the leaks at the Mall were common knowledge in the community but said that other than his discussion with the librarian, it was not something that was discussed at city hall or otherwise brought to the attention of City employees.<sup>286</sup>

### Trow report of November 10, 1994

#### Overview: Excessive leakage, rusted steel beams – corrosion will continue

On November 10, 1994, Trow presented its report, marked “draft” and dated November 9, 1994.

The abstract stated

[t]he soffit of the suspended roof slab was generally in good condition but indicated evidence of excessive leakage through the joints of the precast hollow slabs above the mall level. The steel beams were noted to be rusted at locations where evidence of leakage was observed. Some water stains were also noted on the soffit of the pedestrian walkway slabs. Some metal pans and pails were noted above the false ceiling in the stores to divert the water leakage.

The structural steel members are sound with some surface corrosion. The chloride ion content is generally higher in the concrete topping and contamination of the precast slab is at its initial stage. Corrosion of the embedded reinforcement can be expected to continue at all areas of leakage.<sup>287</sup>

#### Photographs from the 1994 inspection show increased leaks and damage since the 1991 survey

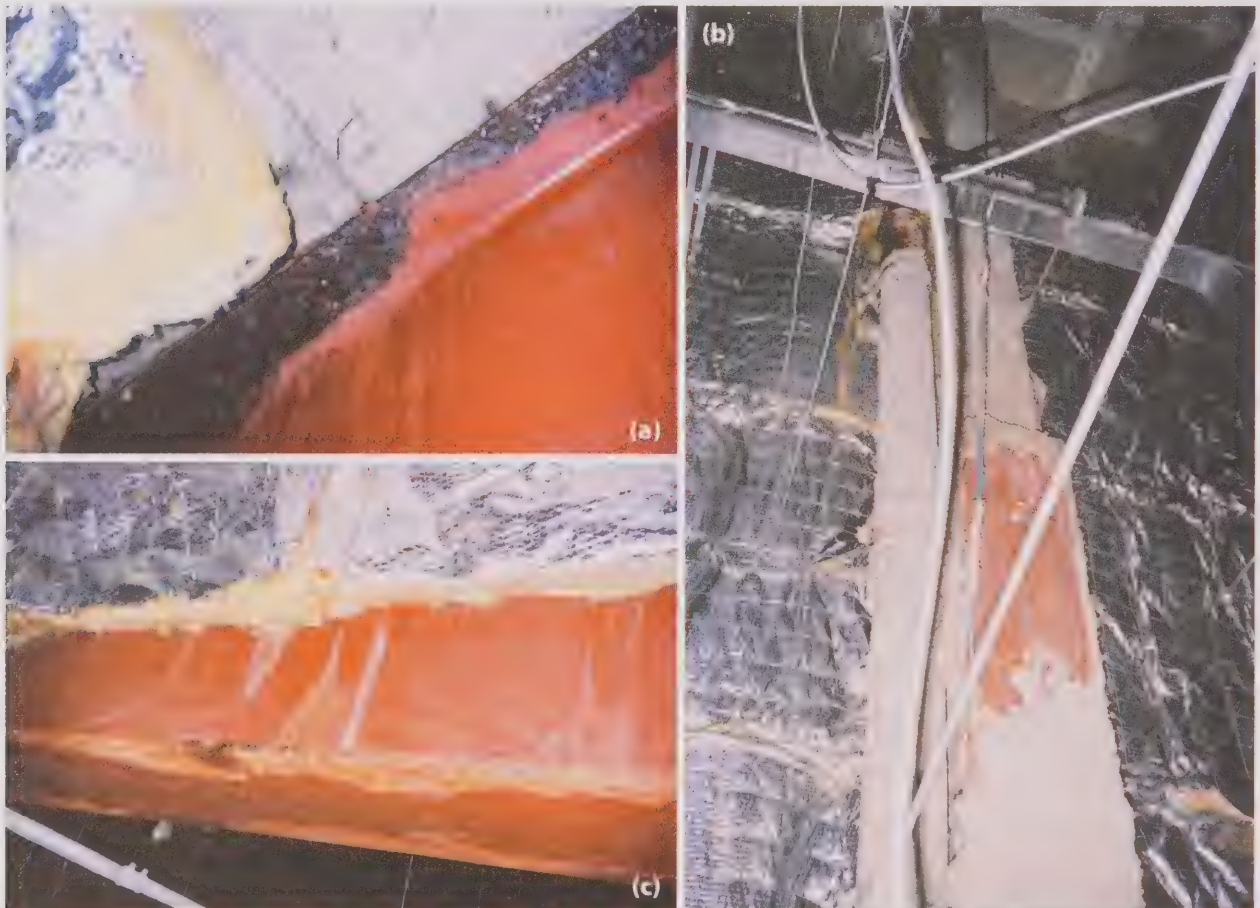


Figure 1.5.4 (a) evidence of corrosion on the top flange of a beam; (b) missing fireproofing on a column; and (c) evidence of corrosion on the bottom flange of a beam.

Source Exhibits 1119, 3104 and 3127



As it had done in its 1991 report, Trow included in its 1994 report, as an appendix, a drawing of the parking level showing the condition of the soffit. For comparison purposes, the drawing also included the observations that had been made in 1991. The legend on the 1994 drawing includes symbols for broken false-ceiling tracks, missing tiles, reported leaks, stained fixtures, and new stains on the false ceilings. Mr. Dell'Aquila considered that there was only a bit more rusting on the beams in 1994 than in 1991. He considered that the 1994 drawing, when compared to 1991, showed even greater evidence of widespread leakage. He said the evidence of leakage in 1994 is "at least double, if not more than it was in '91."<sup>288</sup>

### **Concrete topping debonded from slabs; concrete in slabs deteriorated with contamination in its initial stage**

Trow took nine core samples, all through the concrete topping. Some drilled deeper into the precast slabs so Trow could look at chloride ion content and the condition of the pre-stressed strands in the slabs and the condition of the top surface of the supporting beams.<sup>289</sup>

Trow found the concrete topping surface to be in generally good condition, but found deterioration of the concrete farther down in the cores. The majority of the cores still revealed little or no bond between the concrete topping and the top surface of the precast hollow core slabs. The wire mesh in the concrete topping was generally rust-free, with one exception: two of the cores revealed rusted pre-stressed strands – located in the grout between the precast slabs. The two full-depth core samples revealed surface rusting on the top flange of the steel beams encountered.\*

The chloride ion content was generally higher in the concrete topping, and contamination of the precast slab was said to be in its initial stage. The report noted that corrosion of the embedded reinforcement "can be expected to continue at all areas of leakage"<sup>290</sup> and that the concrete topping would continue to deteriorate as a result of the high chloride content and the effects of freeze–thaw action. The fact that the chlorides had begun to contaminate deeper into the precast slabs "could likely cause rusting of the pre-stressing strands in the slabs" in the areas of leakage.<sup>291</sup>

### **Slabs and beams – evidence of excessive leakage, fireproofing missing from beams, beams rusted but structurally sound, no reference to connections**

In addition to examining the cores, Trow once again conducted a visual survey of the soffit by doing a walk-through of stores in the Mall, with a focus on those with a history of water-leakage problems and previously documented leaks. At selected accessible and suspect areas in both previously viewed areas and new locations, Trow exposed the underside of the precast slabs by removing suspended ceiling panels in order to review the condition of the concrete and structural steel members.<sup>†</sup>

The soffit of the suspended roof slab was generally in good condition but showed evidence of excessive leakage through the joints between the hollow core slabs. Metal pans and pails were noted above the false ceilings in the stores to divert the water leakage.<sup>292</sup> As in its previous report, Trow observed numerous water stains on the false ceilings and rusted tracks throughout the Mall. By removing some of those tiles, Trow was able to see that the false-ceiling tiles were water stained in areas coinciding with the joints between the hollow core slabs above. Active leaks were noted, and ceiling tiles were seen to be bulging as a result of water leakage. Some drain pipes and metal conduits also had rust.<sup>293</sup>

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\* Exhibit 461, pp. 978–9. Trow found the concrete topping thickness to range from 35 to 80 millimetres, which is in keeping with the original design drawings.

† Exhibit 461, p. 976. Mr. Dell'Aquila explained in testimony that they used a very tall ladder to get up above the ceiling tiles and look at the beams and connections: Dell'Aquila testimony, March 20, 2013, pp. 2180–1.



Water stains were noted on the soffit of the pedestrian walkway slabs.<sup>294</sup>

The top and bottom flanges of the steel beams were observed to be rusted at locations where there was evidence of leakage. Again, fireproofing was missing as a result of water damage. Insulation foil and metal clips showed rusting.<sup>295</sup> The steel beams were nevertheless found to be sound with “some surface corrosion.”<sup>296</sup> The bottom flange of one beam, considered to be in the worst condition of the rusted beams observed, was measured by removing the scaled rust. The thickness of the bottom flange was measured to be 18 millimetres.\*

The report did not contain any reference to the connections between the steel beams and the columns. Mr. Dell’Aquila testified that connections were part of the structural members that Trow was required to inspect as set out in the scope of its work. It was his evidence that, while the report did not mention the connections, some photographs of connections were in the file.<sup>297</sup>

Mr. Dell’Aquila explained that neither he nor Mr. Iamono was a structural engineer. Typically, if, on a job, they saw something related to the structure, the loss of section of beams and connections, or otherwise, they would bring it to the attention of a structural engineer. In both 1991 and 1994, they did not believe the conditions warranted referring the matter to a structural engineer.†

### Conclusion: All deterioration will increase with continued leaks

Despite the strong words of warning given orally during the site visit, Trow tempered its language in the written report and simply noted in the conclusions of its report that the deterioration of the soffit would increase (as opposed to “increase exponentially”) if water and salt penetration continued:

The soffit of the precast hollow core structural slab exhibits numerous signs of leakage, mainly through the control joints between the precast panels. Water and salt penetration through joints will cause deterioration of the concrete, prestressed cables, steel beams, sprayed on fireproofing for steel beam, false ceiling tiles and electrical conduits to increase.<sup>298</sup>

### Recommendation for a structural review

#### *Inconsistencies on issue of necessity of bonding of concrete topping noted*

In its 1994 report, Trow addressed the issue of whether the concrete topping must be bonded to the precast slabs. It noted that Mr. Caughill had asked whether such bonding was a requirement of the building’s structural design. Structural drawings showed insulation between the top of the core slabs and the topping, meaning that the two elements were not required to be bonded. Architectural drawings showed insulation under the slabs, suggesting that the concrete topping would be bonded to the top of the slabs. An engineer at Coreslab had advised Trow that the topping did have to be bonded.<sup>299</sup>

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\* Exhibit 461, p. 978. Mr. Dell’Aquila clarified that the assessment that the steel members were sound with “some surface corrosion” was made on a visual basis, with spot-checking of the worst locations. Only the one location was physically measured: Dell’Aquila testimony, March 20, 2013, p. 2168. Trow did not measure the surface corrosion at the connection but instead on the beam flange because that was where the rusting was at its worst: Dell’Aquila testimony, March 21, 2013, p. 2182.

† Dell’Aquila testimony, March 21, 2013, pp. 2233–4; Iamono testimony, March 21, 2013, pp. 2464–5. Mr. Dell’Aquila had encountered situations of that nature during his career. At one mall, for example, safety risks related to the structure were of concern. Structural engineers were brought in and the owner advised of the potential safety risk. The engineers proposed shoring until appropriate repairs could be made: Dell’Aquila testimony, March 20, 2013, pp. 2235–6. Mr. Iamono gave similar evidence. In situations where Trow deemed that review by a structural engineer was necessary, he stated, Trow would call in the engineer to review the condition before writing the report – the company would not simply produce a report saying that further review by a structural engineer was necessary: Iamono testimony, March 21, 2013, pp. 2467–8.

Trow recommended that a structural review and analysis be carried out to determine whether the concrete topping is required and the capacity of the roof slab, and to provide the necessary data to allow discussion of the various options for placement of a waterproofing system.<sup>300</sup> Trow suggested that the structural review be done as soon as possible, citing structural concerns related to the debonded concrete:

As was noted in Trow's 1991 condition survey report, approximately 10% of the concrete topping is debonded, predominantly at the caulked control joint locations. Assuming that the percent of debonded concrete topping has not increased substantially, we do not feel that the percentage of previously noted debonded topping produces an immediate concern. However, it should be noted that, with time, the amount of debonding is likely to increase, thus becoming a structural concern.<sup>301</sup>

***Algocen attempts, unsuccessfully, to have the report changed to remove a reference to the necessity for a structural review***

The abstract to the draft report provided on November 9, 1994, contained the following statement summarizing Trow's advice:

A structural review and analysis is recommended to determine the capacity of the roof slab and to provide the necessary data in order to discuss the various options for the placement of the waterproofing system.<sup>302</sup>

On December 5, 1994, Rod Caughill wrote to Mr. Dell'Aquila:

We have reviewed the report for the Algo Centre (as submitted) and we offer the following:

- 1) in the Abstract the statement is made "a structural review and analysis is recommended ... system." This statement seems contrary to the objectives as stated further into the report. This statement should be removed.<sup>303</sup>

Mr. Caughill testified that Mr. Leistner asked that he make this request simply because Algocen had not asked for a structural review.<sup>304</sup> Mr. Leistner gave similar evidence. He agreed, however, that the suggestion was completely in line with what he had been thinking for some time, at least since the meeting of June 1992, noting that "at the end of the day" the effect of the water on the structure had to be determined.<sup>305</sup>

The request did not succeed. Trow refused to change the report. On January 31, 1995, Mr. Dell'Aquila wrote Mr. Caughill:

The purpose for the structural review and analysis is to confirm whether the concrete topping is required since there are several inconsistencies in the original drawings on this project and in addition to further recommend possible modifications in order to determine what type of waterproofing system can be installed (i.e. thick or thin) depending on the loading the slab can take due to the waterproofing system.<sup>306</sup>

That letter attached a copy of the relevant page from the final version of the report. Trow italicized its redraft of the paragraph about which Algocen had complained. It read:

A structural review and analysis is recommended to determine whether the concrete topping is required and to provide the necessary data in order to discuss the various options for the placement of a new waterproofing system specifically with respect to the allowable additional load the slab can take due to the waterproofing system.<sup>307</sup>

## NORR criticism of Trow 1994 report: Not enough attention to structural steel

As noted earlier, following the collapse of the Mall, the Ontario Provincial Police retained NORR Limited to carry out a forensic investigation into the causes. In its report, NORR found that Trow did not pay enough attention to the steel and commented as follows: "This report appears to have been concentrated almost solely on the condition of the precast hollow core panels."<sup>308</sup> Dr. Hassan Saffarini, on NORR's panel of engineers, was challenged on this statement, and he responded: "[I]f one reads the reports, this is the impression that you would come out with." Dr. Saffarini maintained his view that the steel should have been given a higher priority.<sup>309</sup>

The 1994 Trow report was not the only consultant's report to have concentrated almost exclusively on the condition of the hollow core precast slabs. Reports obtained later also seemed to focus on the condition of the concrete. I find it difficult to understand the professional fixation with concrete deterioration (and precast hollow core slabs particularly) to the exclusion of the corrosive effects of water and chlorides on steel; explanations for this unfortunate situation come to mind, but are (and should remain) in the realm of the speculative, absent more conclusive evidence.

## Algocen's mixed reaction to the Trow 1994 report – relief that deterioration not worse, but recognition that structural audit still needed

Rod Caughill testified that Algocen had mixed reactions to this second Trow report. On the one hand, there was relief that things had not become rapidly worse. The steel in the worst area of leakage had shown only minor deterioration. He did note, however, that the concrete topping had higher salt content than anticipated, and that the report was consistent with the warning given by Mr. Iamonaco during the site visit that, although the roof was not yet a problem, the corrosion would increase exponentially if the leakage was not fixed.<sup>310</sup>

There is no doubt Algocen understood that the potential existed for future structural issues if the situation was left unchanged and that the building would not last indefinitely without costly repairs.<sup>311</sup> Mr. Leistner wrote a memo for Algocen's CEO, Mr. Cresswell, on November 28, 1994. In it, he expresses concern, flowing specifically from Trow's recent advice, about the long-term structural integrity of the parking deck due to leaks: "The subject water leakage has caused concerns with both the disintegration of concrete and the corrosion of structural steel. A structural audit should be performed ..."<sup>312</sup> In his testimony before me, Mr. Leistner confirmed that he recommended the structural audit because he wanted to know if the leaks had shortened the expected life.<sup>313</sup> In that memorandum, Mr. Leistner also wrote: In any event it may be prudent to actively attempt to dispose of the development at a realistic price.<sup>314</sup>

On December 20, 1994, Mr. Cresswell sent a memorandum to Algoma Central's board of directors. He wrote that he had been asked by the chairman of the board to review the company's investment in Elliot Lake. He recommended a thorough structural audit

of our physical assets in Elliot Lake [with the handwritten addition by Mr. Leistner of the words "focusing on the parking deck"], over the course of 1995 to determine its integrity and possible future maintenance costs. As well, we will more aggressively determine the marketability of the complex at least to better establish its value.<sup>315</sup>

Mr. Leistner testified that he received approval from the board for that proposed course of action. Unfortunately, as I will describe below, no such structural audit was ever obtained by Algocen.



## February 1995: Algocen meets with consultant about selling the Mall

On February 28, 1995, Mr. Cresswell and Mr. Leistner met with a consultant (at Mr. Cresswell's direction) and discussed possible options for Algocen to deal with the Mall. A memo to file prepared by Mr. Leistner indicates that they considered selling (at a fair price, but not prepared to give it away), leasing, accepting a vendor-take-back mortgage in a sale, and turning the Mall into a limited partnership. The note stated that an option that "appears worthwhile" was to try to improve lease terms to "present a strong long-term value proposition." The note makes no mention of spending money on fixing the roof.<sup>316</sup> In pricing the Algo Centre, Algocen continued to have concerns about the Elliot Lake market as well as the parking deck and its potential degradation.<sup>317</sup>

## September 1995: Ministry of Labour conducts inspection after complaint

### **The *Occupational Health and Safety Act*, enforced by the Ministry of Labour, is the governing framework for workplace safety in Ontario**

In 1995, the Ministry of Labour conducted two inspections at the Library in relation to parking deck leaks. It is therefore necessary, at this stage of the Report, to explain the role of the Ministry of Labour in ensuring workplace safety in Ontario. The Commission heard from two senior officials on this topic. The first was Sophie Dennis, who was the assistant deputy minister, Operations Division.<sup>318</sup> The second was Roger Jeffreys, who held the position of provincial engineer, but had worked previously as a health and safety inspector.<sup>319</sup> The ministry also provided the Commission with an overview paper on the *Occupational Health and Safety Act* and the roles and responsibilities of industrial inspectors.<sup>320</sup>

Workplace health and safety in Ontario is governed by the *Occupational Health and Safety Act*<sup>321</sup> and the regulations made pursuant to it.\* Workplaces that fall under the Act's definition of "industrial establishment" (which includes offices, factories, and retail operations such as the Algo Mall) are governed by Regulation 851 – Industrial Establishments.<sup>322</sup>

The Ministry of Labour administers and enforces the *Occupational Health and Safety Act*. It also employs and trains the inspectors who conduct inspections in Ontario's workplaces.

### **The "internal responsibility system" – the foundation of workplace safety in the province**

The foundation of the *Occupational Health and Safety Act* is what Ministry of Labour witnesses referred to as the internal responsibility system, a concept where workplace parties have a day-to-day responsibility for health and safety.<sup>323</sup> The intent is that problems in the workplace be reported to the employer and rectified, to the greatest extent possible, independently of Ministry of Labour inspections.<sup>324</sup>

A key component of this system is the Act's requirement that workplaces of a certain size have either a health and safety representative or a Joint Health and Safety Committee. Workplaces with six to 19 employees must have a health and safety representative. Workplaces with 20 to 49 employees must have a Joint Health and Safety Committee composed of at least one worker and one management representative. Workplaces of 50 or more employees must have a Joint Health and Safety Committee composed of at least four members, two from management and two from non-management staff. Certain members must be certified. Certification entails basic and specific training on workplace safety.<sup>325</sup>

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\* The exception is for workplaces falling under federal jurisdiction.

If the workplace has only a health and safety representative, as opposed to a committee, that person must inspect the workplace once each month and report back to the employer with his or her findings.<sup>326</sup> During a visit, a Ministry of Labour inspector would expect to see some record of these monthly inspections.<sup>327</sup>

Where the workplace is large enough to require a Joint Health and Safety Committee, the committee must meet once every three months and keep minutes of the meetings. The physical condition of the workplace must also be inspected once a month.<sup>328</sup> Consulting minutes and monthly inspection notes, along with questioning the health and safety representatives or committee members, helps ministry inspectors ensure compliance with the Act and gather information about safety concerns.<sup>329</sup>

The Joint Health and Safety Committee has a series of powers under the Act, including the power to make recommendations, to both the employer and workers, for improving health and safety.<sup>330</sup> The employer does not have a duty to report a health and safety concern to the ministry<sup>331</sup> but is ultimately responsible for fixing identified health and safety concerns or providing reasons for not doing so.<sup>332</sup> If problems are not remedied, a visiting inspector who consults the inspection reports and/or minutes of committee meetings and observes a lack of action may require the employer to take further measures to address the issue.<sup>333</sup>

Similarly, no obligation is placed in the Act on Joint Health and Safety committees, health and safety representatives, or workers to contact the Ministry of Labour when faced with a health and safety concern. Again, the expectation is that a well-functioning internal responsibility system will achieve the necessary results without having to involve the ministry.<sup>334</sup>

### **The Ministry of Labour imposes a duty on the employer to ensure the structural integrity of the workplace**

Pursuant to the *Occupational Health and Safety Act* and Regulation 851, the employer has a specific obligation to ensure that a workplace is structurally sound.

Section 25 of the Act requires the employer to ensure that a workplace is “capable of supporting any loads that may be applied to it” as determined by the *Building Code*, where applicable. Section 120 of Regulation 851 states that the *Building Code* applies to industrial establishments with respect to structural adequacy,<sup>335</sup> and section 72 of Regulation 851 states that where there is structural damage such that a collapse of any or all of the structure is likely to occur and cause injury to a worker, the building must be braced and shored, or access to the area must be prevented.<sup>336</sup>

As such, a violation of the *Building Code* may amount to a violation of the *Occupational Health and Safety Act* and may lead to orders from the Ministry of Labour to rectify the situation.<sup>337</sup> (The next main section of this chapter sets out some of the types of orders that might be made in this situation.) The requirement that a workplace building be able to safely support any applicable loads has been a requirement of the *Occupational Health and Safety Act* since it came into force in 1979.<sup>338</sup>

### **Ministry of Labour inspectors: Few in number in relation to workplaces, but having the power to remedy structural and other deficiencies**

The Ministry of Labour performs proactive, unannounced inspections based on certain criteria and also performs reactive investigations in response to a particular complaint.<sup>339</sup> If, during an inspection, the ministry determines there has been a contravention of the Act or regulations, an inspector may enforce compliance using compliance orders and/or commence a regulatory prosecution under the *Provincial Offences Act*.<sup>340</sup>

Ministry of Labour inspectors tend to specialize in one of four sectors: mining, construction, industrial, and health care.<sup>341</sup> There are approximately 430 inspectors in Ontario, responsible for more than 200,000 workplaces and five to six million employees in the province. Approximately 180 of the 430 inspectors are industrial inspectors.<sup>342</sup>

With so many workplaces and workers compared to inspectors, the ministry must take a risk-based approach to the allocation of resources. It therefore makes its decisions on where to inspect proactively on the basis of the kind of work being done, workplace size, previous history with respect to non-compliance, and injury rates.<sup>343</sup> The ministry also organizes “blitzes” (focused sets of inspections) of certain types of workplaces to target specific hazards, such as the high potential for injury among young workers during the first three months of employment.<sup>344</sup>

The ministry considers the retail sector to be a low risk sector. The large national retail operations, in particular, are considered very low risk because they typically have detailed occupational health and safety policies and practices and active Joint Health and Safety committees. The retail sector is therefore not visited as often as high-risk workplaces. The ministry never designated the Algo Mall, in particular, as high priority.<sup>345</sup>

The *Occupational Health and Safety Act* sets out the powers of inspectors in section 54. These include the power to

- enter into any workplace at any time without warrant or notice (section 54(1)(a));
- require the production of any drawings or reports, which would include structural drawings (section 54(1)(c));<sup>346</sup>
- ask anyone at the workplace questions that may be relevant to the inspection or investigation (section 54(1)(h)); and
- require the owner to provide a report from an engineer on the structural capacity of a building where there are concerns about the structural adequacy of a workplace (section 54(1)(m)).<sup>347</sup>

A typical Ministry of Labour inspection, according to Ms. Dennis, would start with the inspector introducing himself or herself to the supervisor or employer. The inspector would next determine the number of workers in the workplace, and ask to speak to the Health and Safety Committee members, if they exist, to get a sense of the workplace’s internal responsibility system. The inspector would also ask to view the minutes of committee meetings and ask about unresolved issues before conducting a site inspection and drafting a report that would include any orders issued.<sup>348</sup>

These individual steps are not mandatory. For example, as Ms. Dennis made clear, inspectors are not under a specific obligation to consult the minutes of the Health and Safety Committee during an inspection.<sup>349</sup>

If the inspector observes something that contravenes the Act during an inspection, he or she can make a variety of orders. The inspector can ask that the contravention be remedied immediately (a forthwith order) or by a specific date.<sup>350</sup> If the inspector finds, for example, that a workplace that should have a Health and Safety representative does not have one, an order can be issued pursuant to section 8 of the Act to ensure one is appointed.<sup>351</sup>

Industrial inspectors do not receive specific training on the *Building Code*, other than to understand how it correlates with the Act and Regulation. For example, an inspector would not be trained on the specific *Building Code* requirement that a building be watertight.<sup>352</sup> In this vein, the industrial inspectors do not receive specialized training on structural issues, other than what Ms. Dennis referred to as “hazard identification and what to do if



they see something of question.”<sup>353</sup> She indicated that inspectors were “not the experts in the Building Code,” but needed to be alert to *Building Code* issues.<sup>354</sup> However, if he or she believes that a potential structural hazard exists (engaging the sections related to structural stability cited above), the inspector may use section 54(1)(m) to require an owner, constructor, or employer to obtain a professional engineer’s report stating what the load limits of a workplace are and that the workplace can support the necessary loads.<sup>355</sup>

The Ministry of Labour also employs regional engineers, able to assist inspectors as needed. There are approximately 18 regional engineers (including some structural engineers) distributed throughout the province, with one based in Sudbury covering Northern Ontario.<sup>356</sup> There is one provincial engineer, whose role includes coordinating the activities of the regional engineers. Inspectors can consult regional engineers, including for such expertise as assessing any engineering report produced. In some cases, the engineer may accompany an inspector during a visit where, for example, the inspector has concerns about structural issues in a workplace.\* Ministry of Labour inspectors may also refer an issue involving a suspected *Building Code* violation to a municipal building inspector.†

In a work environment such as the Algo Mall, where the owner employs staff on site and the tenants employ staff within the outlets, an inspector with structural or other concerns can decide whether to issue an order to an employer within the Mall or to the Mall owner itself, depending on the nature and location of the hazard.<sup>357</sup>

### Complaints are supposed to be processed centrally

Anyone from a worker to a member of the general public can make a complaint by phone or in writing (including e-mail) to the Ministry of Labour. The ministry also acts on anonymous complaints,<sup>358</sup> though it has identified them as potentially problematic and suspect from the outset, as seen in the following passage from an overview of the *Occupational Health and Safety Act* prepared for this Inquiry by ministry staff:

Complaints may be made anonymously, which provides a particular challenge for Ministry of Labour inspectors. Many such complaints do not turn out to be legitimate, but instead arise from a workplace or personal grievance. Further, many of the complaints that are legitimate often lack detailed and specific information which would allow an inspector to target and focus his or her response and inspection activities.<sup>359</sup>

Complaints are generally made to the ministry’s Health and Safety contact centre or directly through the ministry’s website.<sup>360</sup> The complaint becomes an “event” that is dispatched from the contact centre to the regional or local office. That office, with no additional information, makes its own assessment of the urgency of the complaint.<sup>361</sup> It is possible for Ministry of Labour inspectors, before inspecting a workplace, to verify if the workplace has had prior complaints.<sup>362</sup>

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\* Exhibit 4125, pp. 011–12; Dennis testimony, April 30, 2013, p. 7483; Dennis testimony, May 1, 2013, p. 7575; Jeffreys testimony, October 3, 2013, pp. 28039–42. The Ministry of Labour also has engineers specializing in the electrical, mechanical, chemical, and mining fields. In 2007, the ministry had only three structural engineers on staff for the entire province: Jeffreys testimony, October 3, 2013, pp. 28039–41.

† Exhibit 4125, pp. 011–12; Dennis testimony, May 1, 2013, p. 7739. Nothing of this nature occurred during the history of the Algo Mall. The Ministry of Labour is currently reviewing this notion of co-operation between the ministry and building departments. Ms. Dennis’s view is that the potential exists for better and closer collaboration, such as creating a situation where municipal inspectors in the field advise ministry inspectors of potential health and safety hazards, and vice versa: Dennis testimony, May 1, 2013, pp. 7738–9, 7721–4.

## In 1995, the Ministry of Labour had an office in the Mall

In 1995, the local Ministry of Labour offices were located at the Mall.<sup>363</sup> Mr. Bauthus mentioned this fact during his testimony, suggesting that as a result of this presence the ministry was aware of the leaks:

Mr. Regan or the other Ministry of Labour officials were aware of the leaks in the mall, not only in the library, I would assume ... I would have to think that if he had some concerns ... with regard to safety or structural safety, because of water infiltration, he would have raised those issues, either through his own auspices or brought them to the attention of the appropriate officials at City Hall, either that being myself or the CBO.<sup>364</sup>

The local inspector was Ralph Regan, an Elliot Lake resident since 1957. Mr. Regan began working for the Ministry of Labour in 1981 and became an industrial inspector (hence, covering retail) in 1992 or 1993. Before that, he had inspected only mines.<sup>365</sup>

## September 22, 1995: Ministry of Labour conducts inspection as a result of complaints of sickness from mould

### Inspector sees evidence of leaking

On September 22, 1995, in response to employee complaints of nausea, fatigue, and sickness from suspected mould,<sup>366</sup> Mr. Regan met Ms. Fazekas at the Library, accompanied by Phil Butler and Debbie Quinn, co-chairs of the City's Health and Safety Committee. This was the first time, from the Commission's analysis, that the Ministry of Labour had conducted an inspection of the Mall directly related to the parking deck leaks. The person who actually carried out the detailed inspection was Dr. Walter Woychuk, a Ministry of Labour medical consultant from Sudbury.<sup>367</sup> Mr. Regan stayed for only a short time, but long enough for Ms. Fazekas to show him the stained ceiling tiles. He agreed in testimony that the stained tiles were an indication that water was coming in from the ceiling.<sup>368</sup>

### Ministry medical consultant finds no mould, but significant potential for mould growth and suggests leaks should be stopped

Dr. Woychuk inspected the Library and issued a report on September 27, 1995, copied to Mr. Regan and the Ministry of Labour's district manager.<sup>369</sup> Mr. Regan said in testimony that he did not recall receiving the report.<sup>370</sup>

Dr. Woychuk's report described the methods used at the Library to deal with the leaks, such as plastic sheets and large buckets to catch water. He also counted out 47 water-stained ceiling tiles throughout the Library, "which would tend to confirm ceiling leakage."<sup>371</sup> He did not find actual mould in the Library, but said the potential for mould growth existed "as long as the water leakage is allowed to exist ... For this reason, the source of the water leakage should be identified and corrected to protect workers from airborne moulds."<sup>372</sup> Dr. Woychuk's "Advice to Management and the Health & Safety Committee" included the following with respect to the leaks: "Strong consideration should be given to take appropriate action to stop water from leaking through the ceiling into the library."<sup>373</sup>

### Inspector issues no order to fix the leaks

Despite having seen the stained ceiling tiles during his visit, Mr. Regan never issued an order to fix the leaks at the Library. He did not think the situation amounted to a violation of the *Occupational Health and Safety Act* because he did not see actual water penetration.<sup>374</sup> Although he did not recall seeing Dr. Woychuk's report – something I am suspicious of but can neither accept nor reject – Mr. Regan also maintained in testimony,

after being shown the report, that he could not have issued an order even in light of Dr. Woychuk's advice that appropriate action be taken to stop the leaks to avoid mould growth in the future.<sup>375</sup> I find Mr. Regan's position to be untenable. Dr. Woychuk clearly identifies several actual and potential workplace hazards in his report – from excessive and widespread leakage to the potential for harmful mould if the leaks persist.

## The 1995 Trow / Tobias structural analysis

### **Algocen asks Trow to determine whether the concrete topping needs to be bonded and to determine the structural capacity of the roof deck and steel**

On June 23, 1995, Mr. Caughill faxed Trow a list of questions that Algocen wanted answered through a structural analysis of the Algo Mall roof. Algocen wished to know whether the concrete topping needed to be bonded to the precast slabs. If the topping needed to be bonded, Algocen wanted to know how to make sure that it remained bonded, whether alternatives to concrete existed, the percentage of debonding acceptable with the current topping and any alternatives, and the load limits of the existing combination of planks and wearing course or any alternatives. If the topping did not need to be bonded, Algocen wished to know whether the concrete topping could be removed without damaging the slabs and what the load limit was for the precast slabs.<sup>376</sup>

Mr. Caughill asked specific questions about the steel:

Is the structural steel capable of taking an additional load (assuming that the slab/topping composite is strong enough to take that load)

If YES

i) to what limits

if NO

i) can the steel be beefed up? how?<sup>377</sup>

He initially testified that his intent in asking these questions was to determine the theoretical capacity of the structure based on the design, and that he was not asking Trow to analyze the effect of the water on the structural steel.<sup>378</sup>

Mr. Caughill was then asked about the subsequent question he asked Trow:

3) Referencing the 2 previous reports:

i) what is the estimated life of the composite roof deck? (assuming that the leakage will be controlled to not exceed the past levels experienced between 1991 and 1994).

What would cause the failure? Will it be caused by degradation of the steel or the concrete (or both) by the chloride concentrations or by some other element (please define).

ii) Based on the two previous reports and the changes noted between them, how often should the structural be "investigated" as it has been in '91 and '94.<sup>379</sup>

Mr. Caughill then gave the following evidence:

Q. And that question, sir, that they were agreeing to answer appears to me to be related to the effect of the water; am I correct?

A. Yes, sir.



Q. And so you were asking Trow, to put it simply, tell me how long the deck is likely to last, assuming that the leakage doesn't get any worse than it was over the last three years, and what will cause the failure, right?

A. Yes, sir.

Q. And why was it you wanted to know that, sir?

A. We were trying to put this to bed. We were – we wanted to get answers to all our questions and do what we could.

Q. And would I be fair to conclude from these answers and from what we have talked about over the last day, day and a bit, is that you recognized that the water had the potential to cause structural damage and you wanted to be certain that the building would not be used longer than its structural capacity?

A. Yes.<sup>380</sup>

Trow provided a proposal in which it agreed to answer those precise questions.<sup>381</sup> Unfortunately, as will be seen, it did not follow through.

### **Trow retains Alex Tobias to do structural engineering analysis**

Alex Tobias Associates Limited, Consulting Structural Engineers, was retained to provide the necessary structural engineering services, acting as the subcontractor to Trow.<sup>382</sup>

### **Tobias does not consider the effect of the leaks on the structure**

In the Tobias portion of the report, dated October 6, 1995, Eric Liu, P. Eng., set out as objectives the evaluation of whether the existing concrete topping needed to be bonded, what the load capacity of the existing structure was, and how much load could be added to allow for a new waterproofing system.<sup>383</sup> His analysis was a theoretical one, not based on an actual inspection of the structure and the effects of leakage to date.

He wrote that his opinion was based on a number of assumptions, including:

- 1 The garage roof structure was constructed in conformity to the existing drawings.
- 2 All garage roof structural components including concrete and steel are structurally sound. Any defect and/or deterioration will be repaired promptly.<sup>384</sup>

Mr. Dell'Aquila testified that Trow informed Mr. Liu of the state of the parking lot and that it had been the subject of ingress of rain and/or water and salt for 12 to 13 years. He could not recall whether Mr. Liu was given copies of Trow's previous reports.<sup>385</sup>

### **Tobias determines from Coreslab that the topping needs to be bonded to the hollow core slabs**

Mr. Liu reported that Mr. Shaikh, the professional engineer employed by Coreslab, had advised him that the concrete topping was required to be fully bonded to the hollow core slabs. His report then proceeded on the basis that that assumption was correct.<sup>386</sup> Ironically, it was Mr. Shaikh who had provided the same information to Rod Caughill in 1992. Algocen's uncertainty and dissatisfaction with this question were among the reasons it had asked for advice from Trow.

### **Tobias concludes that the design of the Mall's structure would support an additional 20 psf of new weight**

Mr. Liu reported that, with a bonded topping, the 8-inch hollow core slabs used at the Algo Centre could support approximately 120 pounds per square foot of load, while the slabs without a topping were able to support only 87 psf. This opinion was based on the load table in the Coreslab catalogue.<sup>387</sup> Mr. Liu also stated that, according to a letter from Mr. Shaikh of Coreslab, increasing the depth of the concrete topping did not increase the live-load capacity of the slab.<sup>388</sup>

Mr. Liu was provided with the original structural design drawings, which required that the roof deck be able to support a superimposed load, both dead and live, of 120 pounds per square foot, but the load was not broken down. However, the Coreslab shop drawings he was given did break it down to 45 psf of dead load (the weight of the topping, the suspended ceiling, and electrical and mechanical components) and 75 psf of live load (essentially the weight of cars and snow).<sup>389</sup>

Mr. Liu concluded that the hollow core slabs, fully bonded, could safely support the basic snow and rain load of 53 psf or 50 psf vehicle load, together with 20 psf of additional superimposed dead load, but found that snow piling and rain load might overstress certain areas of the roof.<sup>390</sup> He wrote:

- According to the available information and our analysis, with the exception of the overstressed core slab areas due to snow piling and rain load, a 20psf maximum weight of new waterproofing system could be added to the existing core slabs with bonded concrete topping.<sup>391</sup>

Dr. Saffarini of NORR explained that Tobias had assumed that the presence of snow (with an assumed load of 53 psf) and a full parking garage (the vehicle load of 50 psf) would not occur at the same time and so both would not have to be supported by the roof. Dr. Saffarini thought that was an acceptable approach.<sup>392</sup> He testified:

The reason why they gave this recommendation is that they changed the project specs, they reduced the load, the live load, from what was specified in the original design as 75, to 50, so that gave them an availability. It is not in recognition of any higher capacity or anything to do with Core Slab, they simply – Core Slab were asked to design for 75 live load, 45 dead load. Alex Tobias said “You don’t need to design for 75 so we’ll live with 50 and we’ll use this to put in the waterproofing.” ... And we are saying that in our report as well.<sup>393</sup>

With respect to the steel beams, Tobias stated that the total allowable superimposed load, including the concrete topping, was approximately 120 psf. It concluded that the steel beams could, like the roof deck, generally sustain the loads from the hollow core slabs with the 3-inch concrete topping, plus basic snow and rain load of 53 psf or vehicle load of 50 psf, as well as an additional 20 psf superimposed dead load.<sup>394</sup>

### **Tobias concludes that a new waterproofing membrane weighing 20 psf could be installed**

Tobias recommended several things – including installing control gates to prevent heavy trucks from entering the roof; and replacing all debonded concrete with fully bonded concrete, while taking care not to damage the existing hollow core slab.<sup>395</sup> Importantly, Tobias stated that a new waterproofing system of 20 psf maximum could be installed:

According to the available information and our analysis, with the exception of the overstressed core slab areas due to snow piling and rain load, a 20 psf maximum weight of new waterproofing system could be added to the existing core slabs with bonded concrete topping.<sup>396</sup>

To deal with the areas of potentially overstressed hollow core slabs, Tobias recommended adding a one-storey roof over those areas but said that option might require reinforcing the steel columns and footings and needed further investigation.<sup>397</sup>

## **November 6, 1995: Trow report endorses Tobias's opinion – and still does not consider the effect of the leaks on the structure**

In its portion of the report, dated November 6, 1995, Trow reiterated the conclusions reached by Tobias, including Mr. Liu's conclusion that the slabs with a fully bonded topping could support "the basic snow and rain load of 53 psf or 50 psf vehicle load as well as 20 psf superimposed dead load." Trow thus advised Algocen that a waterproofing system up to a weight of 20 psf could be installed over the existing concrete topping once the debonded portions of the topping were repaired.<sup>398</sup>

### **Trow does not determine the expected life of the structure**

Trow did not answer the question regarding the estimated life of the roof deck, which it had agreed to do on the assumption that the leakage would be controlled to not exceed the 1991 to 1994 levels. Nor did it provide its opinion on the likely cause of the failure, as it had agreed to do. Instead, Trow's report stated, following the question "What is the estimated life of the composite roof deck?"

The roof deck presently contains areas of debonded concrete topping. These areas need to be removed and a new bonded topping installed to maintain the structural integrity of the slab. This should be carried out as soon as possible.

If the debonded topping is not repaired, the core slabs will not be able to safely carry the dead load of the topping since the topping and the core slabs must be bonded. On going leakage through the joints in the topping and core slabs will continue to cause deterioration of the topping and core slabs due to freeze/thaw cycles and chloride contamination of the core slabs and subsequent corrosion of the prestress strands in the core slabs and the supporting steel beams.<sup>399</sup>

Mr. Dell'Aquila admitted that this statement was not an answer to the question. He testified that it was difficult for engineers to give a specific answer and admitted that he could have "added an extra sentence" to indicate that the question was unanswerable.<sup>400</sup>

I would have thought that the better course would have been to not have agreed to answer the question at all. If, after considering the question, the firm determined that it could not be answered, or if it did not have the expertise to answer it, Trow could have, and should have, informed the client of that fact – and explained why. Such an answer may well have provided Algocen with information that would have been useful in determining how to deal with the roof deck.

### **Trow provides two repair options**

Trow's report stated:

Based upon the above conditions along with our other findings, the following repair options should be considered.<sup>401</sup>

#### ***Option 1: Install asphalt based waterproof membrane on top of concrete topping at a cost of \$1.25 million to \$1.5 million***

The first option required removal and replacement of the debonded concrete topping and the installation of a waterproofing system on the entire deck. It proposed an asphalt-based system and a one-storey canopy structure over the existing garage roof in the overstressed areas.<sup>402</sup> The option proposed in 1991 of removing the concrete topping and installing a membrane directly on the slabs was no longer advanced by Trow. Mr. Dell'Aquila testified that this decision was a result of Tobias's advice that a fully bonded topping was necessary.<sup>403</sup>



The report estimated the cost of option 1 to be in the range of \$1.25 million to \$1.48 million, plus professional and incidental costs.<sup>404</sup> It did not provide a price for option 2.

***Option 2: Local repairs to leaks and debonded concrete topping, new expansion joints, and partial roof canopy***

Option 2 was described in the report in the following way:

- a) Identify leaking cracks and debonded concrete topping areas in the roof slab.
- b) Locally remove concrete topping in the deteriorated areas to expose the top surface of the cores slabs.
- c) Install additional or modify drains as required.
- d) Install a new expansion joint waterproofing system in slab.
- e) Install caulking in joints in the repair areas and conduct local caulking repairs to portions of debonded caulking in the joints in other areas of the parking deck.
- f) Install a one storey roof canopy structure over the existing garage roof in areas where the core slabs could be overstressed due to snowpiling and rain load as determined by ATA.<sup>405</sup>

**Trow recommends option 1**

Trow recommended option 1 and noted:

Our recommendation is based upon the following criteria:

- a) The structural analysis carried out and the history of leakage problems at this structure.
- b) Option 1 assures complete repair to the parking structure facility and minimizes long term maintenance costs.
- c) Although Option 2 may initially be less costly, the long term maintenance costs will exceed the initial costs of Option 1. In addition Option 2 only addresses a small percentage of the problem and in the long term it will be more costly to conduct on going local repairs. On going local repairs also creates the problem of numerous construction joints in the concrete topping system and inconvenience to the mall and parking deck.<sup>406</sup>

Trow's report also recommended that repairs be conducted with the involvement of professional engineers:

We further recommend that Trow Consulting Engineers Ltd. be retained to prepare the Repair Specifications and Tender Documents and to carry out construction review and testing during the actual repairs. Should you wish to have these services carried out by others, we would suggest that Trow Consulting Engineers Ltd. be retained for a general review of the repair specifications to verify that our recommendations are properly interpreted and implemented in the specifications and that they are in accordance with the present state of knowledge.<sup>407</sup>

**Trow recommends that a survey of the parking deck be done in 1996**

In response to the specific question of how often the structure should be investigated, Trow stated:

We would recommend that an update survey of the parking deck be carried out in the spring of 1996 in order to gather the information and repair quantities (i.e. amount of debonded concrete topping, etc.) to prepare repair specifications for the rehabilitation of this parking deck. Once the parking deck has been repaired and waterproofed, the Algo Centre maintenance personnel at this structure should carry out a visual inspection of the parking deck on a monthly basis.<sup>408</sup>

### **Trow's evidence at the Inquiry: It did not recommend option 2 and felt that it was not a viable option**

Mr. Dell'Aquila testified that the second option essentially involved the same system of patching and repairs that had been used since the beginning.<sup>409</sup> During his testimony, he was pressed on why Trow would even put forth the option of continuing to do the same type of repairs. He defended Trow's approach by pointing out that the report had specifically stated that the second option would solve only part of the problem and cost more in the long run. Trow's recommendation was the full waterproofing.<sup>410</sup> Mr. Dell'Aquila felt Algocen should have understood that, by continuing with business as usual, it would not be following Trow's recommendation.<sup>411</sup>

Although Mr. Dell'Aquila did not consider that Trow was putting the "business as usual" approach forward as a viable option,<sup>412</sup> he did say at one point in his testimony that the patch-and-repair approach would have worked better if it was engineered. By that he meant the preparation of proper repair specifications and a tendering process to pre-qualified restoration contractors with experience with this type of work. However, he stated, "it's not the same option as option 1, which would be to waterproof the entire deck. Option 2 would have ... caused continued leakage into the slabs."<sup>413</sup> Mr. Dell'Aquila also said that Trow was not offering option 2 as viable, but only as an option. At one point in his testimony he stated that he couldn't recall why Trow even bothered offering this second option.<sup>414</sup>

Mr. Dell'Aquila gave the following evidence:

Well, the way we worded the intent of our letter is that we still recommended the waterproofing, and that if they still wanted to continue routing and sealing and doing the joints, they would still continue to have potential higher maintenance and leakage. They would be able to possibly control it a bit more, with the engineered approach, but, typically, when you are comparing sealant repairs to waterproofing repairs, the sealant repairs would require more maintenance than a complete waterproofing.<sup>415</sup>

Mr. Iamono, for his part, felt that in putting this option forward, but highlighting the dangers, he was in fact pointing out that it was not a viable one. He was conveying to Algocen that what it was doing was not proper and could not continue. Business as usual amounted to "wasting your money" and the wrong thing to do.<sup>416</sup> In the end, however, he agreed that the language used conveyed this message only "indirectly," although he pointed to the clear language about this option solving only a small percentage of the problem.<sup>417</sup>

### **Dr. Saffarini's opinion about the report: It did not state that option 2 was not viable**

Dr. Saffarini of NORR was asked about Trow's proposed options and did not agree that it was saying that option 2 would not solve the problem. "I don't know that they said that it will not solve the problem," he testified. "They indicated that there are shortcomings in taking this option. So they clearly favored the option of waterproofing. I don't think that they said this option is not a viable [one] or it is an ineffective option but it has numerous shortcomings." He did agree that Trow was saying that, if Algocen wanted a solution that solved the entire problem, it should take option 1, the waterproofing option.<sup>418</sup>

Importantly, Dr. Saffarini commented that, at this point in time (i.e., the time of the 1995 Trow / Tobias report), there was nothing inherently wrong with the structure requiring retrofitting.<sup>419</sup> He did say that, if the corrosion continued unabated, there is "a point of no return in terms of the capacity of the structure having been depleted ... the threshold would have been reached somewhere around the early 2000s."<sup>420</sup>

### **Comment: Clearer reports are better**

I am puzzled by the apparent reluctance, by the writers of all the engineering reports, to express clear and straightforward conclusions and recommendations in precise and unequivocal language. If Trow had provided a dire warning as to the consequences of continual leaking, option 1 would have appeared as the only effective one. By putting the non-option in its 1995 report, Trow might be seen as suggesting that the second option was a viable one, although a less satisfactory one.

## **Algocen's reaction to the 1995 Trow / Tobias report**

### **Algocen did not ask why Trow had not answered the two key questions – the effect of the water, and the expected life of the structure**

Trow had not answered two fundamental and interrelated questions that were part of its scope of work – the effect of the water, and the expected life of the building.

Rod Caughill agreed in his testimony that that was so. He then gave the following evidence:

Q. And, sir, what, if anything, did you do or say with respect to Trow about what you have told me are their failure to answer two of the key questions, the effect of the water on the structural steel and the life of the deck? Did you go back to them and say, answer these questions?

A. I don't recall that we did or we did not.

Q. Can you tell me why you didn't?

A. I don't recall whether we did or we didn't.

Q. Okay, you don't recall?

A. No.

Q. You'll agree with me that there is no document in which you asked that question – those questions?

A. Correct.

Q. And if you had asked those questions, would you expect it to have been done in writing and left in the file of Algoma Central Corporation?

A. I would expect it would have been, yeah.<sup>421</sup>

Mr. Leistner also agreed that neither the 1995 Trow report nor the Tobias review answered the questions of the effect of the water on the structure or its estimated life. He could not recall if Algocen went back to Trow and asked for answers.<sup>422</sup> It was his evidence that those questions were never answered. He could not explain why Algocen stopped asking the questions, other than to say that "we were probably just regrouping and seeing what to do next."<sup>423</sup>

I conclude that Algocen did not make inquiries of Trow as to why those questions, which it determined should have been answered by at least 1992, had not been answered. It appears that Algocen had determined that it did not need, or did not want, that information.

### **Algocen did not do an update survey of the roof deck in 1996 as Trow had advised it to do**

Algocen had asked Trow how often the structure should be investigated. Trow advised to have it surveyed again in the spring of 1996. That survey was not done. Rod Caughill could not recall, when asked, why that advice had not been followed.<sup>424</sup> Mr. Leistner thought that it was not done because it was required only for option 1, the preferred option.<sup>425</sup>



**Mr. Caughill advised his superiors, without making further inquiries, that it would be very difficult to install a membrane that added only 20 psf; such a system was available**

Mr. Caughill testified that, when he read the recommendation that a membrane and asphalt wearing course weighing no more than 20 psf could be applied, his reaction was that this advice was contrary to what he had received from “crews that do install for MTO and the City and everything else told us that the minimum they would recommend putting down would be 2 and a half inches of asphalt, which would have added 25 pounds on its own, let alone the membrane and the protection board.” He did not think it could be done.<sup>426</sup>

Mr. Caughill pointed out in his evidence that Trow had recommended that such a waterproofing layer be installed but had not stated that such a product was available. When asked whether he had thought that Trow would make the recommendation without determining whether it could be implemented, he testified that he could not say. He did not ask Trow what product the company was thinking of when it made the recommendation. He could not say why he did not make that inquiry.<sup>427</sup>

Mr. Caughill testified that his recommendation to Algocen was that installing an asphaltic-based wearing course within the parameters of 20 psf was going to be extremely difficult to achieve, and that he had not found such a product in anything he had researched previously.<sup>428</sup>

Mr. Leistner testified that he spoke with Mr. Caughill after receiving the Trow report. Mr. Caughill told him that he had done a lot of research and could not find a system that weighed less than 20 psf. Mr. Leistner testified that he could not say that he directed Mr. Caughill to ask Trow if there was a system that would work, but that he “would be surprised if he didn’t talk to them, with all this conversation going on.” Mr. Leistner did not believe that anyone from Algocen spoke with another engineer to find out if it could be safely done.<sup>429</sup>

Dr. Saffarini testified that there were acceptable asphalt wearing courses and waterproof membranes in 1995 – even as early as 1991, the time of the first Trow report – that could be applied with less than 20 psf.<sup>430</sup>

Mr. Dell’Aquila also testified that such systems were available at the time. They required a thinner membrane and a thinner asphalt wearing course. They required more maintenance than a “thick” system, which has a thicker asphalt layer and a protection board over the membrane but which, with proper maintenance, had a lifespan of approximately 20 years. Notes from the Trow file showed that one of these systems, with the trade name Multi-Guard 2, was the system that the Trow engineers had considered using in 1995.<sup>431</sup> I accept that evidence.

I conclude that Algocen did not ask Trow what product would have been available that would provide effective waterproofing and weighed less than 20 psf because it had no intention of spending approximately \$1.5 million to repair the leaks.

**Algocen continued to repair the parking deck in the usual manner in 1995–6 and continued to contemplate sale**

Despite knowing that a waterproofing membrane was the recommended solution to stop the leaks and the deterioration of the structure, Algocen continued to repair and patch the roof using the same procedure it had used in previous years. The roof was never made watertight during Algocen’s ownership. Rod Caughill and Robert Leistner both insisted that, as the years progressed, less time was required for repairs. It was their evidence that staff became more experienced at catching leaks before they became a problem; workmanship, materials, and design improved, and Algocen was removing debonded concrete topping and applying new bonded topping on a regular basis.<sup>432</sup> The best evidence on this point, which I accept, is that of Mr. Snow, the man who did the work on the roof and supervised the work of others: the techniques never changed over the years between 1989 and 2005, although the workers did get better at their job. But the leaks never went away.<sup>433</sup>

## Trow did not provide the City with any of its reports – there was no requirement that it do so

Trow did not provide the City of Elliot Lake with a copy of any of the reports produced for Algocen, nor did it contact the City in any other context. In Mr. Dell'Aquila's view, it would not have been something he would have done unless his professional obligations required him to do so for safety reasons.<sup>434</sup> The code of ethics governing Certified Engineering Technicians and Technologists was substantially the same in the early 1990s as it is today.<sup>435</sup> It requires, among other things, that someone in Mr. Dell'Aquila's position "report to the appropriate agencies any hazardous, illegal or unethical professional decisions or practices by fellow members or others." Those rules of professional conduct, likewise, define professional misconduct to include "failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public."<sup>436</sup> Mr. Dell'Aquila's view was that, despite the recommendation in the 1991 Trow report that the repairs be carried out as soon as possible in order to maintain the structural integrity of the building and prevent further deterioration, from 1991 to 1995 the leakage and observations he made were not such that he viewed the situation as a safety issue that required reporting to the appropriate agencies.\* Mr. Iamonaco was of the same opinion. The building was not structurally unsound at the time, although it could have become that way at sometime in the future if not maintained and waterproofed.<sup>437</sup>

Mr. Dell'Aquila thought it would be a sensible requirement to have engineering reports registered on title. He did not know of any other way to acquire past engineering reports if they were not in the current owner's possession.<sup>438</sup>

## Algocen never transferred information to the City about roof leaks and repairs

Rod Caughill never considered giving the Trow reports to the City during his involvement with the Mall. He was aware, in "general terms," that the City of Elliot Lake had a Property Standards By-law requiring that properties be structurally sound and watertight, but he never specifically considered whether the Mall was in compliance. "I mean, we were just maintaining the building," he testified.<sup>439</sup> Similarly, Mr. Leistner never considered telling the City of Elliot Lake about Algocen's concerns for the long-term structural integrity of the rooftop parking deck. He described it as a deterioration issue and a long-term issue: "We were worried about tomorrow. We always thought the building was safe."<sup>440</sup>

Algocen never applied for a building permit for any of the work that related to sealing the parking deck, such as the expansion joint work, replacement of the bonded concrete topping, and the cutting into the hollow core slabs. Although Mr. Caughill was aware that the *Building Code Act* defined "construct" to include any material alterations or repairs of a building, he simply did not consider these types of things to be material, even if the work had effects on the engineered products. Algocen never gave any indications to the City that this work was being done because it considered it to be simply building maintenance.<sup>441</sup>

.....

\* Dell'Aquila testimony, March 21, 2013, pp. 2350–6. He viewed the appropriate agencies in a situation such as this one to be the owner and his company, Trow, but also possibly the municipality: "If it got to that stage, yes": Dell'Aquila testimony, March 21, 2013, p. 2347. Later in his testimony, however, he agreed that the report produced was the owner's property, and that he had a duty to act with integrity toward the client and maintain confidentiality. He was not aware of any guidance available on how to balance the conflict between this duty of confidentiality and the duty to protect the public. At one point, though, he did suggest that, if faced with a dangerous condition in a publicly accessible building, he would have no choice but to inform other parties, such as municipal officials, if, after he had informed the owner, the owner refused to remedy the danger: Dell'Aquila Testimony, March 21, 2013, pp. 2386–7, 2410–11.

### **November 1995: Council approves long-standing policy that Property Standards By-law enforcement is “complaint-driven”**

On November 14, 1995, Mr. Burling, the City clerk, submitted a report to the mayor and members of council recommending the adoption of by-law–enforcement practices.<sup>442</sup> The purpose of the document was to codify the City’s enforcement practices in the various areas.<sup>443</sup> This policy document provided that the enforcement of the City’s Property Standards By-law No. 79-15 was “complaint driven.”<sup>444</sup> It was approved by City Council.

Mr. Bauthus signed off on this report and was aware of its contents. He agreed that the document was a description of how Elliot Lake had been approaching enforcement of the City’s Property Standards By-law.<sup>445</sup> The report, prepared after City services were restructured following mine closures, was meant to convey to council the level of services that staff could provide, and were providing, in a context where resources were thin. The codification of City policy was to make clear that Elliot Lake was not “actively going out and pursuing infractions of the by-law.”<sup>446</sup> Mr. Bauthus felt, though, that if the City’s property standards officer learned independently of an infraction of the by-law, he or she could investigate and potentially issue an order, although he suggested it depended on the seriousness of the infraction and the safety issues at stake.<sup>447</sup> Mr. Bauthus did not recall any discussions at council on the potential effects of a complaint-driven enforcement policy in terms of protecting people who went into buildings.<sup>448</sup>

### **December 7, 1995: Algocen continues to explore options to sell the Mall**

Algocen continued to seriously consider ways to sell the Algo Centre. It received advice from a consultant on December 7, 1995, that the property be listed for sale in 1996, perhaps using a real estate investment trust method of packaging in order to realize certain tax benefits.<sup>449</sup> As of December 31, 1995, Algocen’s estimate of the book value of the property was \$5,057,000.<sup>450</sup>

### **December 19, 1995: Second inspection by Ministry of Labour – complaint of poor air quality, and no order issued**

On December 19, 1995, the Ministry of Labour conducted another inspection of the Library to test the air quality.<sup>451</sup> Mr. Regan met again with Ms. Fazekas, Ms. Quinn, and possibly Mr. Butler, this time accompanied by a Ministry of Labour hygienist.<sup>452</sup> According to Ms. Fazekas, this second inspection was initiated as a result of concerns the Library had about the state of the ceiling above the tiles as well as sanitary issues associated with the leaking water.<sup>453</sup> Mr. Regan, however, had no recollection of discussing the state of the leaks during the visit or of what people at the Library were saying about the situation.<sup>454</sup>

Mr. Regan met with Ms. Fazekas on July 9, 1996, as a follow-up to the December 1995 visit. At this time, Mr. Regan presented an “exposure assessment report.”<sup>455</sup> The Commission was not provided with this report, and no witness could give evidence on its contents. No order was issued by the Ministry of Labour as a result of the December 1995 visit and follow-up.<sup>456</sup>



## February–March 1996: Mr. Leistner recommends that Trow's favoured \$1.5 million repair not be done, and that long-term ownership of the Algo Centre is not warranted

Mr. Leistner prepared a memorandum that bore the typed date of March 28, 1996. The typed date had been crossed out and a handwritten date of February 21 written above it.<sup>457</sup> It was an update of his report to Mr. Cresswell of November 28, 1994, and reflected the recommendations of Mr. Leistner and Mr. Topp (Algocen's vice-president of finance). Mr. Cresswell testified that it was his "guess" that the memorandum had been written on February 21, 1996, because his assistant had a habit of using old memos and updating them. I am not able to reach a conclusion on which of the two dates this memorandum was written. Mr. Leistner set out in the memorandum four options for disposal of the Mall, each of which had difficulties. He testified that, at the time he wrote the memorandum, he thought the Mall would be a hard piece of property to sell.<sup>458</sup> He wrote:

Although there may be opportunities for small improvements in the cash return of the Centre, over the long-term there is no reason to see any significant improvement. In balancing upside with downside risks, long-term ownership of the Centre is not warranted. This is the first time in over ten years where there is a positive outlook from our two anchor tenants. The Foodland store is quite successful and the Met store presents a positive image because it is new and was willing to go into the Elliot Lake market. We should take advantage (as small as it is) of this situation and attempt to sell the Centre for whatever the market will bear.

Proposed Plan of Action:

I would recommend that we consolidate the previous mentioned options and do the following:

- i) Continue to prudently manage the project by maximizing cash flows and dealing with the maintenance issues.
- ii) List the property with a real estate broker. A non-exclusive listing would allow a private sale at no monetary loss.
- iii) Concurrent with ii) above, promote a sale through contacts.
- iv) Consider a vendor take-back mortgage with a short amortization period.
- v) As a REIT would likely offer the greatest value, we would do this if the opportunity arose.

If, after a fixed period of time (say six (6) months) there are no positive responses to the above, we would re-visit the issue and decide whether we want to auction the property.<sup>459</sup>

Mr. Leistner testified that after this memorandum was sent, Algocen continued to "prudently manage the project by maximizing cash flows and dealing with the maintenance issues." He did not agree that that meant the company would not spend \$1.5 million to fix the roof. He testified that if the expenditure "fixed it and you did an analysis and it might have been good for the long term, then you – then it would add on to the estimated useful life of the project." He did not do that analysis. Mr. Leistner's evidence was that the analysis was not done because Algocen had no option to evaluate – "you need a viable option to evaluate."<sup>460</sup>

On March 27, 1996 (either the day before or five weeks after the day the memorandum referred to above was written), Mr. Leistner wrote a short handwritten note:

Algo Centre

1. Trow recommends [illegible]
    - we should consider redoing the whole roof top parking
    - cost = \$1.5 mill.
  2. Simple Issue:
    - i) No guarantee
    - ii) I personally believe it won't stop the problem
- Risk is too great vs opportunity cost to sell the Centre<sup>461</sup>

Mr. Leistner testified that this note reflected his thoughts and beliefs at the time. He said he personally believed that the proposed membrane would not work, even though Trow had given its professional opinion that it would work. The only explanation he could give for his belief was that there was no guarantee, even though he had not asked Trow for a guarantee. In any event, he did not expect that a professional engineer would give a guarantee that the repair method he or she recommended would work – he had never seen such a thing in his career. The “risk” referred to in the last line was, he testified, the great financial risk of spending the money to implement Trow’s proposal. He then gave the following evidence:

- Q. And by “opportunity cost” you mean you’re considering the money you’re going to spend to fix it, what you say is a million and a half here on the one hand, versus what effect that would have on the value of the asset once it was spent, is that fair?
- A. Are you throwing good money after bad on an obsolete building?
- Q. And you concluded that it would be throwing good money after bad on an obsolete building?
- A. No, we concluded it with the information that we had. We didn’t go through the process because we didn’t have a viable option. If we had a viable option in our mind, we would have gone through the valuation process. The million and a half did not include all the costs. We know that and I think Trow admits that. There were other costs involved in this project, and there was timing issues. We didn’t even have any knowledge of that at this time. We didn’t go back and ask because the project wasn’t viable.<sup>462</sup>

I do not accept this evidence. There was no basis for Mr. Leistner to believe, or conclude, that the solution proposed by Trow of installing a membrane at an approximate cost of \$1.5 million would not have worked. Trow had given the opinion that it would work. I have heard evidence that it would have worked. Nobody from Algocen checked with any engineer or other professionals to determine whether it had received bad advice from the professionals it had retained.

## 1996: Paul Meyer is hired to conduct a design review of the Algo Centre

### Review was prompted by Mr. Kadlec’s licence suspension; Algocen was not seeking an analysis of the effect of the leaks on the structure

In early 1996, Algocen learned that the Professional Engineers of Ontario had suspended Mr. Kadlec’s professional engineer’s licence. It decided to review the structural drawings for the Algo Centre to ensure that the design met professional standards and to ensure workmanship and conformity with design. It was not looking for a determination of the effect of the water on the structure over time.<sup>463</sup> That quest appears to have been abandoned by this time.

### Paul Meyer hired over Trow: Cheaper and less comprehensive review

Algocen wrote to Trow on April 24, 1996, requesting a proposal to do the design and construction review.<sup>464</sup>

Don Cooper and Mr. Iamonaco of Trow wrote back on June 12, 1996, with a proposal.<sup>465</sup> Trow proposed to use Tobias again as subcontractor.<sup>466</sup> The fee to complete the proposed scope of work was quoted at \$17,000 and covered the following work:

- random visual review of field conditions to compare with the drawings, and random measurements of existing structural members to verify against the design details;
- exposing and measuring of the existing structural members where design details are not available;
- spot checking of structural steel connections;
- weld inspection and torque testing of bolts, where and if required;
- general review to identify any deteriorated structural components; and
- removal of portions of existing structural steel elements for strength testing of suspect members.<sup>467</sup>

Algocen considered that Trow's proposal went beyond what was asked.<sup>468</sup> Dissatisfied with Trow's proposal, Algocen approached Paul Meyer, a civil engineer with a degree in architecture. He was licensed in Ontario as an engineer in 1990, and until 1994 worked in a firm with Bruce Caughill – an architect and engineer, and Rod Caughill's brother. Mr. Meyer began his own practice in 1994. In 1998 he moved to British Columbia, where he continues to work as an engineer.<sup>469</sup>

Mr. Meyer had done previous work for Algocen in late 1995, in relation to a collapse at the Station Mall in Sault Ste. Marie, also owned by Algoma Central Properties. He was called in immediately after that collapse and worked with the fire department to search for survivors or victims.<sup>470</sup> He eventually conducted a detailed review of the design of the Station Mall, which had a girder system similar to the one used at the Algo Centre. Mr. Kadlec had been the engineer at both locations.<sup>471</sup>

On July 5, 1996, Mr. Meyer provided a quote for the design review. The total fee quoted for the work was \$4,200.00. The proposal<sup>472</sup> covered the following:

- Review the structural design using the building codes in place at the time of original design and construction. This review could be completed by looking at the drawings and associated calculations.
- Provide an on-site review and spot check of the structural framing to confirm that the size of members and the connections were in conformance with the original design and accepted construction practices. (This review was to confirm that the as-built conditions met the specifications).
- If necessary, carry out a more detailed examination of any areas found to be deficient in design or construction based on the structural design review. (This last step was ultimately not required).<sup>473</sup>

Algocen accepted Mr. Meyer's proposal because it felt that he had quoted on exactly what was asked, and because his quote was significantly lower.<sup>474</sup> Mr. Meyer, in viewing the Trow proposal during testimony, considered that it was more expensive in part because Trow was using a senior engineer out of Toronto, while he was local; and also because Trow was proposing a more detailed review, more akin to a condition assessment.<sup>475</sup>

Mr. Meyer agreed that certain of Trow's recommended steps, such as the torque testing, would have brought the inspectors close up to the steel bolts and connections, even where hidden or covered.<sup>476</sup> His review, however, would involve random measurements of the steel to verify size, dimensions, and details, and his approach involved spot checking the connections, although possibly only from a distance. Mr. Meyer confirmed that, as a professional engineer, if he saw deteriorated components he would have reported them.<sup>477</sup>



### Mr. Meyer did not review the Trow reports

Rod Caughill offered to provide the previous Trow reports but Mr. Meyer refused them, not wishing to bias his opinion. Mr. Caughill believed Mr. Meyer was familiar with Algocen's waterproofing problems as a result of their discussions, the long history of leaks, and Trow's recommendation that a membrane system be installed.<sup>478</sup> Mr. Meyer, however, said he was not specifically aware of the fact that the structure had leaked since construction, and he did not recall discussions of that nature. During his time on site, he did learn that the roof needed to be sealed on a regular basis.<sup>479</sup> He did not recall seeing the Trow reports, and essentially confirmed Mr. Caughill's evidence that he had not been interested in seeing previous reports because he wished to do an independent review:

I'm not sure if Ontario had adopted this at this point, but I know for example in BC they are fairly clear on saying that the person who does the design check of a project should be someone who's not associated with it and hasn't been directly involved. Because that way they're not going to ... fall into the same traps as the first engineer did.

And so I wouldn't have been interested in seeing someone else's analysis on it. ... The idea was to look at it with a completely fresh set of eyes ...<sup>480</sup>

Mr. Meyer worked only from the structural drawings, shop drawings, Coreslab drawings, and perhaps some of the architectural drawings.<sup>481</sup> When he testified, Mr. Meyer was taken through the first two Trow reports and asked if, had he been in possession of this information at the time of his review, he would have done anything differently. He replied: "Probably, because I am exclusively a structural engineer and I don't have any specialized knowledge in waterproofing, I probably would have reminded the owner that it was fairly critical to make sure that this thing didn't leak."<sup>482</sup>

### Mr. Meyer discovers issues with the roof deck slabs that caused cracks

Algoma was doing some work on the major expansion joint near the Woolco store (at Gridline 10-10X) at about the time Mr. Meyer was scheduled to do his design review. Damage to the hollow core slabs was discovered during this process, and Mr. Meyer was asked to look at it. He visited the site on August 31, 1996, and returned on September 4, 5, 6, and 8.<sup>483</sup> Mr. Meyer discovered that, according to the structural drawings (S-17), there was supposed to be a 2-inch (50 mm) gap between the precast slabs along that line over Woolco.<sup>484</sup> He observed that the gap was about 10 millimetres when he arrived in the morning but had closed completely by 3 pm as a result of thermal expansion of the slabs.<sup>485</sup> There were vertical cracks in the slabs, and Mr. Meyer had concerns that the cracking would compromise the load capacity and potentially lead to failure.<sup>486</sup>

During this process, Mr. Meyer contacted Coreslab and asked that one of its representatives visit the site to review the slabs and provide a proposed method of repair. Mr. Shaikh attended on Sunday, September 8, and provided written instructions for the repair method, with a follow-up letter later that week. The repairs were carried out.<sup>487</sup> In the end, Mr. Meyer was never able to determine why the expansion joint closed up like it did, but thought it might have related to the thermal expansion he had observed.<sup>488</sup> He speculated, as well, that the 2-inch gap was not properly and uniformly left between the precast slabs.<sup>489</sup> No evidence was provided in support of this speculation.

### Mr. Meyer concludes design adequate to support appropriate load requirement

Mr. Meyer conducted the on-site portion of the design review at the same time he was addressing the hollow core slab problem.<sup>490</sup> He provided his Review of Structural Design and Construction at the end of October 1996.<sup>491</sup> He concluded that the design of the support system was adequate to support the specified dead and live loads.<sup>492</sup> While he determined that the 45 psf dead load was too low, meaning that the cantilevered beams and girders were overstressed, he also found that the prescribed 75 psf for live load was overly conservative and not necessary, hence, balancing out the dead-load overstressing. Given that only passenger cars and pickup trucks were allowed access to the parking area meant that, according to Mr. Meyer's calculations, 50 psf was the maximum live load required.<sup>493</sup> He then calculated that it was reasonable to conclude that snow loads for the building would also never exceed 50 psf, so long as the building remained occupied. Using effectively the same analysis as Mr. Liu had used, that both snow load and a full vehicle load would not be present at the same time, he concluded that an appropriate live load for the parking deck was 50 psf, not 75 psf, assuming large vehicles were always kept off the roof.<sup>494</sup> When analyzed using the correct live load of 50 psf, the structural steel framing was generally acceptable and in conformance with the Ontario *Building Code* in effect at the time of construction.<sup>495</sup>

Mr. Meyer also found that the precast slabs were designed in conformance with the Ontario *Building Code* and were generally installed correctly, with the exception of the problem at the expansion joint over Woolco.<sup>496</sup>

Mr. Meyer concluded that the concrete topping needed to be bonded to the precast slabs in order to support a load of 120 psf. However, he found that by themselves the precast slabs could support his corrected live load of 50 psf and dead load of 45 psf and testified that "[t]his means that the bonding of the existing concrete topping to the precast slabs is not necessary from a structural standpoint."<sup>497</sup> He suggested that the ability of the slabs to take 95 psf came directly from Coreslab's own published tables.<sup>498</sup> His figure is to be contrasted with the Commission's information, which is that Coreslab's tables prescribed a load of 87 psf for similarly sized hollow core slabs.

Mr. Meyer was pressed on how he reached the conclusion that the concrete slab needed to be bonded in order to attain 120 psf. He agreed that structural drawing S4 did not show that a composite slab was needed to obtain 120 psf.<sup>499</sup> It was also pointed out to him, and he agreed, that the upper Mall level (i.e., the inside second floor of the building, drawing S3)) called for 120 psf with no bonded topping required. He did not notice this fact during his design review.<sup>500</sup> Mr. Meyer could not explain how it was consistent to say that the parking level slabs required a bonded concrete topping to achieve 120 psf, while the upper Mall level, with the same 120 psf load requirement and using the same slabs, did not.<sup>501</sup>

Mr. Meyer concluded that the original design engineer made two errors in designing this girder structural steel framing system. The first was to not consider the "full and partial" loading on the roof; and the second was to use a live load that was 50 percent higher than required. "Fortunately," Mr. Meyer found, "the second error made the final product more conservative than might have otherwise been built, and more than compensated for the effects of the first error."<sup>502</sup>

### Mr. Meyer recommends heavy vehicles be kept off the roof

He also made the suggestion in his report that the roof may have been overloaded in the past when buses went on it. He suggested that buses would not have overstressed the steel and likely did not damage the slabs, but they may have led to cracks between the slabs in the grouting, cracks in the concrete topping, and consequent water entry into the building. He recommended ongoing monitoring of the leaks and their prompt repair.<sup>503</sup>

Given that the foundations, structural steel, and precast concrete slabs were determined to be capable of supporting their loads, Mr. Meyer made no recommendations for modification or alteration of the structural system. He suggested, though, that the large heavy vehicles allowed on to the parking deck could potentially create serious structural problems. He recommended that the movable gates at the bottom of the ramps leading to the parking deck be made into permanent and non-movable barriers with a clearance of 7 feet so as to allow passage of only passenger cars and 4 x 4 pickup trucks.<sup>504</sup>

Mr. Meyer testified that he did not notice any loss of section during his review. However, he was not looking specifically for it and looked at only certain beams during his design review.<sup>505</sup> His report made no reference to corrosion observed during his review of the Mall.

He suggested, though, that the large heavy vehicles allowed on to the parking deck could potentially create serious structural problems.

### **Mr. Meyer concludes that a waterproof membrane could be installed on the roof**

Given his finding that the bonded concrete topping was not necessary from a structural standpoint, Mr. Meyer concluded that it could be removed and a conventional parking deck waterproofing system applied:

Should a decision be made in the future to remove the concrete topping to apply a conventional parking deck waterproofing system, this could be done provided the weight of the new wearing surface was examined.<sup>506</sup>

With the receipt of the Meyer report, Algocen was now in possession of two reports which advised that the roof deck parking could support the load from a membrane and wearing course waterproofing system, with attention to be paid to the weight of the wearing course laid over the top of the membrane. However, as discussed below, Algocen chose to prefer its own opinion and decided, despite advice to the contrary from Trow and Mr. Meyer, that the rooftop parking could not support the weight of membrane and wearing course.

### **Algocen's reaction to the Meyer report – business as usual**

Algocen appears to have focused on the recommendation in the report that large vehicles needed to be prevented from going on the roof. Despite Mr. Meyer's recommendation that permanent barriers be installed, Messrs. Caughill, Leistner, and Liautaud ultimately reached the conclusion that, although movable, the barricades in place were doing an effective job of keeping this type of traffic off the deck.<sup>507</sup> Algocen once again decided that it knew best and failed to follow the advice it received from the engineers.

Rod Caughill was specifically asked about Mr. Meyer's conclusion that the slabs could take 95 psf even without a bonded topping and his opinion that the concrete topping could be removed and a waterproofing system applied, depending on the weight. Mr. Caughill agreed that this was yet another opinion on the issue, but said he did not notice this aspect of the Meyer report at the time. He therefore did not follow up to resolve the differences in opinion he was getting from Trow, Coreslab, Mr. Kadlec, and now Mr. Meyer.<sup>508</sup> Mr. Leistner, for his part, said he would have relied on Mr. Caughill to give him an overview of this report and did not recall ever discussing the waterproofing option put forward by Mr. Meyer.<sup>509</sup>

Algocen continued with the same maintenance approach for the parking deck, which involved walking the deck, looking for joints that required repair, and attempting to stop leaks before they became a problem.<sup>510</sup> Through to the sale of the building, the leaks were never fully stopped.<sup>511</sup>



## Conclusion: Algocen chose to sell the Mall rather than fix it

Mr. Leistner insisted that Algocen would have considered spending something in the order of \$1.5 million to fix the roof despite the fact that it was looking to maximize cash flow and for opportunities to sell the Mall. Mr. Leistner said that if a viable option existed for repairing the roof, he would have reviewed the costs to assess whether doing so would have amounted to a good long-term decision.<sup>512</sup> He insisted that if Algocen had not entered into discussions with Retirement Living about buying the Algo Centre, Algocen would have again turned its mind to addressing the roof repairs. However, once the possibility arose that Retirement Living would buy the Mall, Algocen proceeded on the basis that the new buyer would do its due diligence and deal with the roof if they bought the property.<sup>513</sup>

I do not accept that evidence. I have come to the conclusion that, at some point in the early to mid-1990s Algocen determined that, rather than fixing the roof, the wiser course of action was to sell the Mall to minimize losses and remove the problem. I come to that conclusion after considering these facts:

- In 1991, it asked Trow for a report on the building's structural integrity because it had concerns about potential structural damage caused by the leaks. One of the reasons for that report being requested, as set out in correspondence from Algocen to Trow, was that "we have definite concerns regarding structural damage."
- Trow advised Algocen in 1991 that:
  - the waterproofing design was inappropriate;
  - it was very likely that further deterioration and leakage would continue to occur if the entire slab and expansion joints were not waterproofed;
  - its recommendation was to install a membrane at a cost of \$1.26 million.
- Algocen asked Trow if a membrane was actually necessary and was told it was.
- Mr. Caughill testified that, after receiving Trow's first report, he understood that a full waterproofing system was necessary to maintain the structural integrity of the roof deck and the only way to achieve that was to install a membrane.
- Although Algocen had concerns about the ability of the roof to support the proposed membrane system, it did not go back to Trow to voice its concerns or retain any other engineer to ask for an opinion on the issue.
- Instead, it continued to maintain the roof deck in the same way it always had – the same method that had produced the problems reported on by Trow.
- In September 1991, four months after the first Trow report, the vice-president of finance of Algoma Central Corporation questioned the wisdom of continuing to operate the Mall and began a series of discussions among senior executives about the best way to deal with the property – sell it, fix it, or close it down.
- In February 1992, Mr. Leistner recommended selling the Mall for whatever price it would fetch. Among his concerns was the capital cost of fixing the roof. From this point forward, Algocen regularly engaged in activities and discussions about selling the Mall.
- In June 1992, senior executives of Algocen met and reached a consensus that:
  - there was "no question we have to do something (within our financial restrictions)" (but never did anything different to deal with the leaks); and
  - "at the end of the day," it would have to engage in testing and re-evaluation of the load capabilities of the structure because of its age and the degradation caused by the leaks (but never conducted that re-evaluation).

- Algocen did nothing to further investigate the physical condition of the Mall until 1994, three years after it had received the first report. Mr. Leistner could not explain why it had waited so long and not sought any other professional advice in the interim.
- Algocen received an oral warning in June 1994 that, although there was not yet a structural problem, the corrosion would accelerate exponentially if the leakage was not treated. Yet the company never changed the way that it had treated the leakage.
- Trow advised Algocen in writing in 1994 that the water and salt penetration through joints would cause structural deterioration to increase.
- In 1994, Trow recommended that a structural audit be obtained. Mr. Leistner echoed that recommendation in a memorandum of November 28, 1994, to the CEO, and the board of directors approved a structural audit “to determine its integrity and possible future maintenance costs.” Algocen retained Trow in 1995 to answer specific questions, including the effect of the years of leaks on the structure and the effective life expectancy of the building. When those questions were not answered by the report provided, Algocen did not make inquiries or ever again seek to have that issue determined.
- At the same time that Mr. Leistner recommended that a structural audit be obtained, he recommended that the building be disposed of “at a realistic price.”
- In December 1994, the board of directors approved a recommendation to determine the integrity of the building and possible future maintenance costs, and to “more aggressively determine the marketability of the complex.”
- Although Mr. Caughill testified that in 1995 the company wanted to be certain that the building would not be used longer than its structural capacity, it took no further steps to ensure that this intention was carried out.
- In 1995, Trow recommended that a membrane be installed at a cost of \$1.5 million. Algocen took the position that Trow’s advice was wrong and that no suitable membrane was available, but did not ask Trow or any other professional whether there was such a membrane on the market. Had it asked, it would have learned that there was a suitable application available.
- Instead of making the recommended repairs or investigating other options, Algocen continued the maintenance regime it had always followed and focused its energies on selling the Mall.
- It clearly could have afforded to fix the roof but did not do so.
- In the spring of 1996, Mr. Leistner again recommended to Mr. Cresswell that they should “attempt to sell the Centre for whatever the market will bear” and “continue to prudently manage the project by maximizing cash flows and dealing with the maintenance issues.”
- As will be seen, Algocen commenced discussions with Retirement Living in 1997 and ultimately agreed to sell the Mall in 1999 for \$4 million, having been prepared to take only \$3.5 million.
- The Mall was sold “as is.”
- During the course of the negotiations, Algocen did not provide to Retirement Living any of the engineering reports it had obtained describing the state of the roof deck and the leaks.

In my view, the best determinant of what a party intends to do is what, in fact, it does. Algocen was told it needed to apply a membrane at a cost of \$1.5 million in order to fix the leaks and ensure structural integrity. It was told that it could do so. Over a lengthy period of time, it did not do so. Instead, it sold the Mall. I conclude that the company decided that the more prudent course of action, for financial reasons, was to sell the Mall rather than fix it.

## Notes

- <sup>1</sup> Rod Caughill testimony, March 12, 2013, p. 1332.
- <sup>2</sup> Rod Caughill testimony, March 12, 2013, p. 1333.
- <sup>3</sup> Farkouh testimony, May 7, 2013, pp. 8375–6.
- <sup>4</sup> Rod Caughill testimony, March 12, 2013, p. 1337.
- <sup>5</sup> Rod Caughill testimony, March 12, 2013, p. 1333.
- <sup>6</sup> Rod Caughill testimony, March 12, 2013, pp. 1335–7. Mr. Willey's name is on a document as general manager of the Algo Centre in August 1987: Exhibit 2060.
- <sup>7</sup> Rod Caughill testimony, March 12, 2013, pp. 1339–40.
- <sup>8</sup> Rod Caughill testimony, March 20, 2013, pp. 2045–6.
- <sup>9</sup> Rod Caughill testimony, March 12, 2013, pp. 1339–40.
- <sup>10</sup> Exhibit 14; Exhibit 590; Rod Caughill testimony, March 12, 2013, pp. 1356–7.
- <sup>11</sup> Rod Caughill testimony, March 12, 2013, pp. 1349–50.
- <sup>12</sup> Exhibit 578.
- <sup>13</sup> Exhibit 14; Rod Caughill testimony, March 12, 2013, pp. 1351–2.
- <sup>14</sup> Rod Caughill testimony, March 20, 2013, pp. 2045–6.
- <sup>15</sup> Rod Caughill testimony, March 20, 2013, pp. 2044–5.
- <sup>16</sup> Rod Caughill testimony, March 12, 2013, pp. 1367–9.
- <sup>17</sup> Rod Caughill testimony, March 13, 2013, p. 1403.
- <sup>18</sup> Rod Caughill testimony, March 13, 2013, pp. 1409–10.
- <sup>19</sup> Rod Caughill testimony, March 13, 2013, pp. 1410–11.
- <sup>20</sup> Rod Caughill testimony, March 13, 2013, pp. 1594–5.
- <sup>21</sup> Exhibit 2060.
- <sup>22</sup> Rod Caughill testimony, March 13, 2013, pp. 1435–7.
- <sup>23</sup> Exhibit 2060.
- <sup>24</sup> Rod Caughill testimony, March 13, 2013, pp. 1437–8.
- <sup>25</sup> Fazekas testimony, March 11, 2013, pp. 1099–1100.
- <sup>26</sup> Farkouh testimony, May 2, 2013, pp. 7925–6.
- <sup>27</sup> Farkouh testimony, May 15, 2013, p. 7924.
- <sup>28</sup> Farkouh testimony, May 15, 2013, pp. 7924–5.
- <sup>29</sup> Fazekas testimony, March 11, 2013, p. 1101.
- <sup>30</sup> *Public Libraries Act*, RSO 1990, c P.44, s 3.
- <sup>31</sup> Fazekas testimony, March 11, 2013, pp. 1102–3.
- <sup>32</sup> Fazekas testimony, March 11, 2013, p. 1105.
- <sup>33</sup> Fazekas testimony, March 11, 2013, pp. 1104–5.
- <sup>34</sup> Farkouh testimony, May 15, 2013, p. 10057.
- <sup>35</sup> Fazekas testimony, March 11, 2013, p. 1106.
- <sup>36</sup> Fazekas testimony, March 11, 2013, p. 1106.
- <sup>37</sup> Fazekas testimony, March 11, 2013, pp. 1107–8.
- <sup>38</sup> Fazekas testimony, March 11, 2013, pp. 1108–10.
- <sup>39</sup> Fazekas testimony, March 11, 2013, pp. 1111–12.
- <sup>40</sup> Exhibit 1172.
- <sup>41</sup> Fazekas testimony, March 11, 2013, pp. 1114–15.
- <sup>42</sup> Fazekas testimony, March 11, 2013, pp. 1114–16.
- <sup>43</sup> Fazekas testimony, March 11, 2013, p. 1117.
- <sup>44</sup> Farkouh testimony, May 2, 2013, pp. 7930–1.
- <sup>45</sup> Farkouh testimony, May 15, 2013, p. 10024.
- <sup>46</sup> Fazekas testimony, March 11, 2013, pp. 1118–19.
- <sup>47</sup> Fazekas testimony, March 11, 2013, p. 1120.
- <sup>48</sup> Fazekas testimony, March 12, 2013, p. 1293.
- <sup>49</sup> Fazekas testimony, March 12, 2013, pp. 1292–3.
- <sup>50</sup> Fazekas testimony, March 11, 2013, pp. 1121–2; Exhibit 345.
- <sup>51</sup> *Public Libraries Act*, RSO 1990, c P.44, s 19(1).
- <sup>52</sup> Farkouh testimony, May 2, 2013, p. 7935.
- <sup>53</sup> Farkouh testimony, May 2, 2013, pp. 7931–2.
- <sup>54</sup> Farkouh testimony, May 15, 2013, pp. 10057–8.
- <sup>55</sup> Farkouh testimony, May 2, 2013, p. 7934.
- <sup>56</sup> Fazekas testimony, March 12, 2013, pp. 1143–4; Exhibit 11–11.
- <sup>57</sup> Farkouh testimony, May 2, 2013, pp. 7937–8; Farkouh testimony, May 15, 2013, pp. 10030–1, 10090–1.
- <sup>58</sup> Farkouh testimony, May 2, 2013, pp. 7934–5.
- <sup>59</sup> Farkouh testimony, May 2, 2013, p. 8108.
- <sup>60</sup> Farkouh testimony, May 7, 2013, pp. 8407–8.
- <sup>61</sup> Farkouh testimony, May 2, 2013, pp. 7937–8.
- <sup>62</sup> Farkouh testimony, May 7, 2013, pp. 8407–8.
- <sup>63</sup> Snow testimony, April 3, 2013, p. 3950.
- <sup>64</sup> Snow testimony, April 3, 2013, pp. 3950–1, 4027.
- <sup>65</sup> Snow testimony, April 3, 2013, p. 4025.
- <sup>66</sup> Snow testimony, April 3, 2013, pp. 3984–5.
- <sup>67</sup> Snow testimony, April 3, 2013, p. 3985.
- <sup>68</sup> Snow testimony, April 3, 2013, p. 4010.
- <sup>69</sup> Snow testimony, April 3, 2013, p. 4009.
- <sup>70</sup> Burling testimony, April 2, 2013, p. 3784.
- <sup>71</sup> Farkouh testimony, May 15, 2013, p. 10051.
- <sup>72</sup> Exhibit 4335, Chapter 13, Figure 1, p. 004.
- <sup>73</sup> Farkouh testimony, May 7, 2013, p. 8402.
- <sup>74</sup> Exhibit 492; Leistner testimony, March 27, 2013, p. 3271; Leistner testimony, March 28, 2013, p. 3640. Mr. Leistner added that the company had borrowed to build the Algo Centre and this debt was allocated to the specific properties on a carrying value basis.
- <sup>75</sup> Rod Caughill testimony, March 13, 2013, pp. 1437–8.
- <sup>76</sup> Exhibit 586.
- <sup>77</sup> Rod Caughill testimony, March 13, 2013, pp. 1440–2.
- <sup>78</sup> Snow testimony, April 4, 2013, pp. 3963–5, 3975.
- <sup>79</sup> Snow testimony, April 4, 2013, pp. 3966–7.
- <sup>80</sup> Snow testimony, April 4, 2013, pp. 4019–20.
- <sup>81</sup> Snow testimony, April 4, 2013, pp. 3967–8.
- <sup>82</sup> Snow testimony, April 4, 2013, pp. 3962, 3989.
- <sup>83</sup> Snow testimony, April 4, 2013, pp. 3990.
- <sup>84</sup> Rod Caughill testimony, March 13, 2013, p. 1417.
- <sup>85</sup> Exhibit 586 describes these processes. See, also, Rod Caughill testimony, March 13, 2013, pp. 1442–5.
- <sup>86</sup> Rod Caughill testimony, March 12, 2013, pp. 1365–6.
- <sup>87</sup> Rod Caughill testimony, March 13, 2013, pp. 1417–18.
- <sup>88</sup> Snow testimony, April 3, 2013, pp. 3973–4.
- <sup>89</sup> Rod Caughill testimony, March 13, 2013, pp. 1445–9.
- <sup>90</sup> Exhibit 584; Rod Caughill testimony, March 13, 2013, pp. 1421–2.
- <sup>91</sup> Exhibit 584; Rod Caughill testimony, March 13, 2013, pp. 1421–2.
- <sup>92</sup> Rod Caughill testimony, March 13, 2013, p. 1431; Exhibit 584.
- <sup>93</sup> Rod Caughill testimony, March 13, 2013, pp. 1421–5; Exhibit 584.
- <sup>94</sup> Rod Caughill testimony, March 13, 2013, p. 1427–8.
- <sup>95</sup> Rod Caughill testimony, March 13, 2013, p. 1429.
- <sup>96</sup> Rod Caughill testimony, March 13, 2013, pp. 1431, 1505–6.
- <sup>97</sup> Snow testimony, April 3, 2013, p. 3951.
- <sup>98</sup> Snow testimony, April 3, 2013, pp. 3962–3.
- <sup>99</sup> Exhibit 584; Rod Caughill testimony, March 13, 2013, pp. 1434–5.
- <sup>100</sup> Exhibit 2061.
- <sup>101</sup> Exhibit 585.
- <sup>102</sup> Rod Caughill testimony, March 13, 2013, p. 1448; Rod Caughill testimony, March 19, 2013, pp. 1925–6.
- <sup>103</sup> Exhibit 32.
- <sup>104</sup> Exhibit 3007, p. 302; Exhibit 32.
- <sup>105</sup> Rod Caughill testimony, March 13, 2013, pp. 1449–50.
- <sup>106</sup> Exhibit 591; Rod Caughill testimony, March 13, 2013, pp. 1474–82; Exhibit 3007, p. 302.
- <sup>107</sup> Rod Caughill testimony, March 19, 2013, p. 1885.



- <sup>108</sup> Rod Caughill testimony, March 13, 2013, pp. 1483–4.
- <sup>109</sup> Snow testimony, April 3, 2013, pp. 3951–2, 3992–3.
- <sup>110</sup> Exhibit 423; Rod Caughill testimony, March 13, 2013, pp. 1485–8; Exhibit 3007, p. 302.
- <sup>111</sup> Exhibit 423; Exhibit 3007, p. 302.
- <sup>112</sup> Exhibit 423; Exhibit 3007, p. 302.
- <sup>113</sup> Rod Caughill testimony, March 13, 2013, pp. 1486–7; Exhibit 423; Snow testimony, April 3, 2013, p. 3969.
- <sup>114</sup> Pigeau testimony, March 25, 2013, p. 2706; Exhibit 3022 is an example of Algoten's failure to apply for a building permit.
- <sup>115</sup> Rod Caughill testimony, March 19, 2013, pp. 1987–90; *Building Code Act, 1992*, SO 1992, c 23, s 8
- <sup>116</sup> Rod Caughill testimony, March 13, 2013, p. 1460.
- <sup>117</sup> Rod Caughill testimony, March 13, 2013, pp. 1461–2.
- <sup>118</sup> Rod Caughill testimony, March 13, 2013, pp. 1460–1, 1489.
- <sup>119</sup> Leistner testimony, March 27, 2013, pp. 3556–7; Rod Caughill testimony, March 13, 2013, p. 1461.
- <sup>120</sup> Exhibit 33, pp. 4; Exhibit 35, pp. 18; Dell'Aquila testimony, March 20, 2013, pp. 2200–1.
- <sup>121</sup> Iamonaco testimony, March 21, 2013, p. 2442.
- <sup>122</sup> Iamonaco testimony, March 21, 2013, pp. 2440–1.
- <sup>123</sup> Dell'Aquila testimony, March 20, 2013, pp. 2078–9.
- <sup>124</sup> Dell'Aquila testimony, March 20, 2013, pp. 2084–5.
- <sup>125</sup> Exhibit 33: Rod Caughill testimony, March 13, 2013, pp. 1462–5.
- <sup>126</sup> Exhibit 33.
- <sup>127</sup> Exhibit 1089; Rod Caughill testimony, March 13, 2013, pp. 1470–1.
- <sup>128</sup> Exhibit 2064.
- <sup>129</sup> Rod Caughill testimony, March 13, 2013, pp. 1490–1.
- <sup>130</sup> Exhibit 11-11.
- <sup>131</sup> Fazekas testimony, March 12, 2013, pp. 1155–6.
- <sup>132</sup> Exhibit 273.
- <sup>133</sup> Fazekas testimony, March 12, 2013, pp. 1147, 1150–1.
- <sup>134</sup> Fazekas testimony, March 12, 2013, p. 1143; Rod Caughill testimony, March 13, 2013, pp. 1512–13, 1515–16; Snow testimony, April 3, 2013, p. 3875. See, also, Exhibit 273, a letter from Mr. Liautaud to Ms. Taylor dated May 7, 1991, which described the pails, pans, and hoses as “by no means a permanent solution.”
- <sup>135</sup> Exhibit 11-11; Pigeau testimony, March 22, 2013, p. 2577.
- <sup>136</sup> Pigeau testimony, March 22, 2013, pp. 2580–2.
- <sup>137</sup> Pigeau testimony, March 22, 2013, pp. 2597–8.
- <sup>138</sup> Pigeau testimony, March 22, 2013, pp. 2601–3.
- <sup>139</sup> Leistner testimony, March 28, 2013, p. 3607.
- <sup>140</sup> Leistner testimony, March 28, 2013, pp. 3619–20.
- <sup>141</sup> Pigeau testimony, March 22, 2013, pp. 2588–96.
- <sup>142</sup> Pigeau testimony, March 22, 2013, pp. 2599–2600.
- <sup>143</sup> Farkough testimony, May 2, 2013, pp. 8104–10.
- <sup>144</sup> Farkough testimony, May 2, 2013, pp. 8104–10.
- <sup>145</sup> Farkough testimony, May 2, 2013, p. 7939.
- <sup>146</sup> Bauthus testimony, March 25, 2013, pp. 2868–72.
- <sup>147</sup> Bauthus testimony, March 26, 2013, p. 2921.
- <sup>148</sup> Bauthus testimony, March 26, 2013, pp. 2922–3.
- <sup>149</sup> Bauthus testimony, March 26, 2013, pp. 2924–5.
- <sup>150</sup> Bauthus testimony, March 26, 2013, p. 2908.
- <sup>151</sup> Bauthus testimony, March 25, 2013, pp. 2910–11.
- <sup>152</sup> Bauthus testimony, March 26, 2013, pp. 2921–2.
- <sup>153</sup> Bauthus testimony, March 26, 2013, p. 2947.
- <sup>154</sup> Bauthus testimony, March 26, 2013, pp. 2946–49.
- <sup>155</sup> Bauthus testimony, March 26, 2013, p. 3081.
- <sup>156</sup> Bauthus testimony, March 26, 2013, pp. 2949–50.
- <sup>157</sup> Exhibit 35.
- <sup>158</sup> Dell'Aquila testimony, March 20, 2013, p. 2079; Iamonaco testimony, March 21, 2013, p. 2441.
- <sup>159</sup> Iamonaco testimony, March 21, 2013, pp. 2442–4.
- <sup>160</sup> Exhibit 35, p. 5.
- <sup>161</sup> Exhibit 35, p. 5.
- <sup>162</sup> Exhibit 35, p. 5; Dell'Aquila testimony, March 20, 2013, pp. 2087–90.
- <sup>163</sup> Exhibit 35, p. 6.
- <sup>164</sup> Rod Caughill testimony, March 19, 2013, pp. 1787–9.
- <sup>165</sup> Rod Caughill testimony, March 19, 2013, p. 1789; Exhibit 35, Drawings.
- <sup>166</sup> Exhibit 1974. See also Exhibit 35, “Drawings, although the visibility is not good.”
- <sup>167</sup> Exhibit 1974.
- <sup>168</sup> Exhibit 1974; Rod Caughill testimony, March 19, 2013, pp. 1793–5.
- <sup>169</sup> Dell'Aquila testimony, March 20, 2013, p. 2139; Dell'Aquila testimony, March 21, 2013, pp. 2244–8.
- <sup>170</sup> Rod Caughill testimony, March 19, 2013, pp. 1796–9; Exhibit 1974.
- <sup>171</sup> Rod Caughill testimony, March 13, 2013, p. 1523; Dell'Aquila testimony, March 20, 2013, p. 2123.
- <sup>172</sup> Exhibit 35, p. 7.
- <sup>173</sup> Exhibit 35, p. 7.
- <sup>174</sup> Exhibit 35, p. 8.
- <sup>175</sup> Exhibit 35, pp. 8–9.
- <sup>176</sup> Exhibit 35, p. 9.
- <sup>177</sup> Exhibit 35, p. 13.
- <sup>178</sup> Exhibit 35, p. 13.
- <sup>179</sup> Exhibit 35, p. 10; Rod Caughill testimony, March 13, 2013, p. 1532.
- <sup>180</sup> Exhibit 35, p. 10; Rod Caughill testimony, March 13, 2013, p. 1532.
- <sup>181</sup> Exhibit 35, abstract.
- <sup>182</sup> Exhibit 35, abstract. See also p. 8 of the same exhibit.
- <sup>183</sup> Exhibit 35, p. 8.
- <sup>184</sup> Exhibit 35, abstract. See also p. 8 of the same exhibit.
- <sup>185</sup> Exhibit 35, p. 10.
- <sup>186</sup> Exhibit 35, p. 13.
- <sup>187</sup> Dell'Aquila testimony, March 21, 2013, p. 2242.
- <sup>188</sup> Exhibit 35, pp. 9–10.
- <sup>189</sup> Iamonaco testimony, March 21, 2013, pp. 2451, 2454–5, 2458.
- <sup>190</sup> Exhibit 35, p. 13.
- <sup>191</sup> Exhibit 35, abstract.
- <sup>192</sup> Exhibit 35, p. 14.
- <sup>193</sup> Exhibit 35, p. 16.
- <sup>194</sup> Exhibit 35, p. 14.
- <sup>195</sup> Exhibit 35, p. 15.
- <sup>196</sup> Exhibit 35, p. 15.
- <sup>197</sup> Exhibit 35, p. 15.
- <sup>198</sup> Exhibit 35, p. 17.
- <sup>199</sup> Exhibit 35, p. 18.
- <sup>200</sup> Exhibit 35, p. 16.
- <sup>201</sup> Exhibit 35, p. 16.
- <sup>202</sup> Exhibit 35, pp. 16–17.
- <sup>203</sup> Dell'Aquila testimony, March 20, 2013, pp. 2142–8; Iamonaco testimony, March 21, 2013, pp. 2485–6.
- <sup>204</sup> Exhibit 424.
- <sup>205</sup> Leistner testimony, March 27, 2013, pp. 3260–1; Exhibit 424.
- <sup>206</sup> Rod Caughill testimony, March 13, 2013, p. 1553.
- <sup>207</sup> Exhibit 424; Rod Caughill testimony, March 13, 2013, pp. 1551–2.
- <sup>208</sup> Exhibit 424; Rod Caughill testimony, March 13, 2013, p. 1550.

- <sup>209</sup> Rod Caughill testimony, March 13, 2013, p. 1546.
- <sup>210</sup> Rod Caughill testimony, March 13, 2013, p. 1548.
- <sup>211</sup> Rod Caughill testimony, March 13, 2013, pp. 1547–8.
- <sup>212</sup> Exhibit 424; Rod Caughill testimony, March 13, 2013, p. 1552.
- <sup>213</sup> Dell'Aquila testimony, March 21, 2013, pp. 2413–6; Exhibit 181.
- <sup>214</sup> Dell'Aquila testimony, March 21, 2013, pp. 2418–19.
- <sup>215</sup> Dell'Aquila testimony, March 21, 2013, pp. 2364, 2366.
- <sup>216</sup> Rod Caughill testimony, March 13, 2013, pp. 1556–7; Exhibit 425.
- <sup>217</sup> Exhibit 420; Rod Caughill testimony, March 13, 2013, p. 1559.
- <sup>218</sup> Rod Caughill testimony, March 13, 2013, pp. 1563, 1537–9; Rod Caughill testimony, March 19, 2013, p. 1801; Exhibit 35, p. 16.
- <sup>219</sup> Exhibit 420.
- <sup>220</sup> Rod Caughill testimony, March 13, 2013, p. 1549; Exhibit 424; Leistner testimony, March 27, 2013, p. 3263.
- <sup>221</sup> Rod Caughill testimony, March 13, 2013, p. 1549.
- <sup>222</sup> Exhibit 602.
- <sup>223</sup> Exhibit 602.
- <sup>224</sup> Exhibit 602; Exhibit 603; Kadlec testimony, March 6, 2013, pp. 320–1.
- <sup>225</sup> Kadlec testimony, March 6, 2013, pp. 243–9, 315–18.
- <sup>226</sup> Kadlec testimony, March 6, 2013, pp. 249–50.
- <sup>227</sup> Kadlec testimony, March 6, 2013, p. 251.
- <sup>228</sup> Exhibit 492.
- <sup>229</sup> Leistner testimony, March 27, 2013, p. 3278.
- <sup>230</sup> Leistner testimony, March 27, 2013, pp. 3281–2.
- <sup>231</sup> Rod Caughill testimony, March 13, 2013, pp. 1591–2.
- <sup>232</sup> Rod Caughill testimony, March 13, 2013, pp. 1563–4.
- <sup>233</sup> Snow testimony, April 3, 2013, pp. 3974, 4038.
- <sup>234</sup> Snow testimony, April 3, 2013, p. 3974.
- <sup>235</sup> Snow testimony, April 3, 2013, pp. 3975, 4011–18, 4036.
- <sup>236</sup> Rod Caughill testimony, March 13, 2013, pp. 1592, 1596–9; Exhibit 606; Snow testimony, April 3, 2013, pp. 3962, 3991, 3994–7.
- <sup>237</sup> Snow testimony, April 3, 2013, pp. 3970–1, 4004; Exhibit 2113.
- <sup>238</sup> Snow testimony, April 3, 2013, p. 3972.
- <sup>239</sup> Leistner testimony, March 27, 2013, pp. 3273–5.
- <sup>240</sup> Exhibit 609, p. 2.
- <sup>241</sup> Rod Caughill testimony, March 13, 2013, pp. 1587–8.
- <sup>242</sup> Leistner testimony, March 27, 2013, pp. 3299–300.
- <sup>243</sup> Exhibit 40.
- <sup>244</sup> Rod Caughill testimony, March 13, 2013, pp. 1565–6, 1574.
- <sup>245</sup> Rod Caughill testimony, March 13, 2013, pp. 1566–70.
- <sup>246</sup> Rod Caughill testimony, March 13, 2013, p. 1585.
- <sup>247</sup> Rod Caughill testimony, March 13, 2013, p. 1575.
- <sup>248</sup> Leistner testimony, March 27, 2013, p. 3310.
- <sup>249</sup> Exhibit 403; see also Leistner testimony, March 27, 2013, pp. 3301–8.
- <sup>250</sup> Exhibit 403; Leistner testimony, March 27, 2013, pp. 3306, 3309.
- <sup>251</sup> Exhibit 784, p. 16.
- <sup>252</sup> Leistner testimony, March 27, 2013, pp. 3312–13.
- <sup>253</sup> Exhibit 607.
- <sup>254</sup> Kadlec testimony, March 6, 2013, pp. 315–16.
- <sup>255</sup> Kadlec testimony, March 6, 2013, pp. 254–7.
- <sup>256</sup> Kadlec testimony, March 6, 2013, pp. 256–7.
- <sup>257</sup> Rod Caughill testimony, March 13, 2013, pp. 1575–6.
- <sup>258</sup> Rod Caughill testimony, March 13, 2013, p. 1577.
- <sup>259</sup> Rod Caughill testimony, March 13, 2013, pp. 1589–90.
- <sup>260</sup> Kadlec testimony, March 6, 2013, pp. 316–17.
- <sup>261</sup> Rod Caughill testimony, March 13, 2013, pp. 1590–1.
- <sup>262</sup> Leistner testimony, March 27, 2013, p. 3272.
- <sup>263</sup> Leistner testimony, March 27, 2013, p. 3274.
- <sup>264</sup> Leistner testimony, March 27, 2013, pp. 3272–3.
- <sup>265</sup> Leistner testimony, March 27, 2013, p. 3283.
- <sup>266</sup> Leistner testimony, March 27, 2013, p. 3298.
- <sup>267</sup> Exhibits 784, 785, 786, 787.
- <sup>268</sup> Leistner testimony, March 27, 2013, pp. 3314–15; Exhibit 1091.
- <sup>269</sup> Rod Caughill testimony, March 13, 2013, pp. 1600–1; Leistner testimony, March 27, 2013, p. 3316.
- <sup>270</sup> Exhibit 1091; Rod Caughill testimony, March 19, 2013, p. 1822.
- <sup>271</sup> Rod Caughill testimony, March 19, 2013, p. 1822.
- <sup>272</sup> Exhibit 611.
- <sup>273</sup> Rod Caughill testimony, March 13, 2013, pp. 1611–13.
- <sup>274</sup> Leistner testimony, March 27, 2013, pp. 3321–2.
- <sup>275</sup> Rod Caughill testimony, March 13, 2013, p. 1613.
- <sup>276</sup> Exhibit 11-12.
- <sup>277</sup> Exhibit 11-12; Pigeau testimony, March 22, 2013, p. 2608.
- <sup>278</sup> Fazekas testimony, March 12, 2013, pp. 1163–4.
- <sup>279</sup> Pigeau testimony, March 22, 2013, pp. 2609–11.
- <sup>280</sup> Bauthus testimony, March 26, 2013, pp. 2939–40.
- <sup>281</sup> Pigeau testimony, March 22, 2013, pp. 2563–4.
- <sup>282</sup> Pigeau testimony, March 22, 2013, p. 2565.
- <sup>283</sup> Pigeau testimony, March 22, 2013, p. 2566.
- <sup>284</sup> Pigeau testimony, March 25, 2013, p. 2781.
- <sup>285</sup> Burling testimony, April 2, 2013, pp. 3814–15.
- <sup>286</sup> Burling testimony, April 2, 2013, p. 3815.
- <sup>287</sup> Exhibit 461.
- <sup>288</sup> Dell'Aquila testimony, March 20, 2013, pp. 2185–9; Exhibit 1974; Exhibit 3104.
- <sup>289</sup> Exhibit 461, p. 976.
- <sup>290</sup> Exhibit 461, p. 968.
- <sup>291</sup> Exhibit 461, p. 983.
- <sup>292</sup> Exhibit 461, p. 968.
- <sup>293</sup> Exhibit 461, p. 978.
- <sup>294</sup> Exhibit 461, p. 968.
- <sup>295</sup> Exhibit 461, pp. 968, 978, 982.
- <sup>296</sup> Exhibit 461, p. 968.
- <sup>297</sup> Exhibit 35; Exhibit 461; Dell'Aquila testimony, March 20, 2013 pp. 2092–3, 2101–3, 2153–4, 2169–70; Iammonaco testimony, March 21, 2013, pp. 2449–50, 2452.
- <sup>298</sup> Exhibit 461, p. 983.
- <sup>299</sup> Exhibit 461, p. 969.
- <sup>300</sup> Exhibit 461, pp. 968, 983. See also p. 15 of the same exhibit.
- <sup>301</sup> Exhibit 461, p. 983.
- <sup>302</sup> Exhibit 461, p. 968.
- <sup>303</sup> Exhibit 45.
- <sup>304</sup> Rod Caughill testimony, March 14, 2013, pp. 1647–8.
- <sup>305</sup> Leistner testimony, March 27, 2013, p. 3326.
- <sup>306</sup> Exhibit 46, p. 857.
- <sup>307</sup> Exhibit 46, p. 860.
- <sup>308</sup> Exhibit 3007, p. 302.
- <sup>309</sup> NORR Panel testimony (Saffarini), May 30, 2013, pp. 12463–72.
- <sup>310</sup> Rod Caughill testimony, March 14, 2013, pp. 1645–6.
- <sup>311</sup> Rod Caughill testimony, March 19, 2013, p. 1828; Leistner testimony, March 28, 2013, pp. 3560–1; Exhibit 429, p. 870.
- <sup>312</sup> Exhibit 429, p. 868; Leistner testimony, March 28, 2013, pp. 3562–5; Rod Caughill testimony, March 19, 2013, p. 1841.
- <sup>313</sup> Leistner testimony, March 27, 2013, p. 3345.
- <sup>314</sup> Exhibit 429, p. 863.
- <sup>315</sup> Exhibit 381.
- <sup>316</sup> Exhibit 380.

- <sup>317</sup> Leistner testimony, March 27, 2013, pp. 3360–2.
- <sup>318</sup> Dennis testimony, April 30, 2013, pp. 7465.
- <sup>319</sup> Jeffreys testimony, July 31, 2013, pp. 19272–6. Mr. Jeffreys's credentials as an engineer, and his role as provincial engineer, are discussed at greater length in Volume 2 of this Report.
- <sup>320</sup> Exhibit 4125.
- <sup>321</sup> RSO 1990, c O.
- <sup>322</sup> Exhibit 4125; Dennis testimony, April 30, 2013, pp. 7467–8.
- <sup>323</sup> Dennis testimony, April 30, 2013, p. 7469.
- <sup>324</sup> Hudson testimony, July 8, 2013, pp. 14735–6, 14741–2.
- <sup>325</sup> *Occupational Health and Safety Act*, RSO 1990, c O, ss 8 and 9; Hudson testimony, July 8, 2013, pp. 14737–42; Exhibit 4125, p. 002. There are certain exceptions for smaller workplaces using designated substances.
- <sup>326</sup> *Occupational Health and Safety Act*, RSO 1990, c O, s 8(6).
- <sup>327</sup> Hudson testimony, July 8, 2013, p. 14739.
- <sup>328</sup> *Occupational Health and Safety Act*, RSO 1990, c O, s 9(26)(33); Exhibit 4125, p. 002.
- <sup>329</sup> Hudson testimony, July 8, 2013, pp. 14745–7; Dennis testimony, April 30, 2013, p. 7554; Regan testimony, June 5, 2013, p. 12982; Jeffreys testimony, July 31, 2013, pp. 19297–8.
- <sup>330</sup> *Occupational Health and Safety Act*, RSO 1990, c O, s 9(18); Exhibit 4125, p. 3.
- <sup>331</sup> Dennis testimony, April 30, 2013, pp. 7548–9.
- <sup>332</sup> *Occupational Health and Safety Act*, RSO 1990, c O, ss 9(20) and 9(21); Dennis testimony, April 30, 2013, p. 7552.
- <sup>333</sup> Dennis testimony, April 30, 2013, pp. 7553–7; Exhibit 12–46.
- <sup>334</sup> Exhibit 4125, pp. 005–006.
- <sup>335</sup> Exhibit 4125, p. 011.
- <sup>336</sup> Exhibit 4125, p. 011.
- <sup>337</sup> Dennis testimony, April 30, 2013, p. 7474.
- <sup>338</sup> Dennis testimony, April 30, 2013, p. 7476.
- <sup>339</sup> Regan testimony, June 5, 2013, pp. 12980–1; Dennis testimony, April 30, 2013, p. 7500.
- <sup>340</sup> Exhibit 4125, p. 006.
- <sup>341</sup> Dennis testimony, April 30, 2013, p. 7481.
- <sup>342</sup> Dennis testimony, April 30, 2013, pp. 7480–3.
- <sup>343</sup> Dennis testimony, April 30, 2013, p. 7482.
- <sup>344</sup> Dennis testimony, April 30, 2013, p. 7494.
- <sup>345</sup> Exhibit 4125, p. 009.
- <sup>346</sup> Dennis testimony, April 30, 2013, p. 7497.
- <sup>347</sup> Dennis testimony, April 30, 2013, pp. 7500–1.
- <sup>348</sup> Dennis testimony, April 30, 2013, pp. 7505–6.
- <sup>349</sup> Hudson testimony, July 8, 2013, p. 14747; Dennis testimony, April 30, 2013, p. 7470.
- <sup>350</sup> *Occupational Health and Safety Act*, RSO 1990, c O, s 57(1); Hudson testimony, July 8, 2013, pp. 14750–1.
- <sup>351</sup> Hudson testimony, July 8, 2013, p. 14751.
- <sup>352</sup> Dennis testimony, April 30, 2013, p. 7488.
- <sup>353</sup> Dennis testimony, April 30, 2013, pp. 7487–8; Exhibit 4125, pp. 006–7.
- <sup>354</sup> Dennis testimony, May 1, 2013, p. 7739.
- <sup>355</sup> Exhibit 4125, pp. 011–12.
- <sup>356</sup> Dennis testimony, May 1, 2013, p. 7675.
- <sup>357</sup> Dennis testimony, April 30, 2013, pp. 7478–80.
- <sup>358</sup> Hudson testimony, July 8, 2013, pp. 14759–60; Dennis testimony, April 30, 2013, p. 7511.
- <sup>359</sup> Exhibit 4125, p. 009.
- <sup>360</sup> Exhibit 4125, p. 009.
- <sup>361</sup> Dennis testimony, May 1, 2013, pp. 7639–47; Dennis testimony, April 30, 2013, pp. 7511–4; Exhibit 4125, p. 7.
- <sup>362</sup> Hudson testimony, July 8, 2013, pp. 14889–90.
- <sup>363</sup> Fazekas testimony, March 12, 2013, p. 1167; Regan testimony, June 5, 2013, pp. 12978–9.
- <sup>364</sup> Bauthus testimony, March 25, 2013, p. 3150.
- <sup>365</sup> Regan testimony, June 5, 2013, pp. 12967–74.
- <sup>366</sup> Regan testimony, June 5, 2013, pp. 12999–13002; Exhibit 3843.
- <sup>367</sup> Exhibit 3843.
- <sup>368</sup> Regan testimony, June 5, 2013, pp. 12999–13002, 13006.
- <sup>369</sup> Exhibit 3844.
- <sup>370</sup> Regan testimony, June 5, 2013, p. 13006.
- <sup>371</sup> Exhibit 3844.
- <sup>372</sup> Exhibit 3844.
- <sup>373</sup> Exhibit 3844.
- <sup>374</sup> Regan testimony, June 5, 2013, pp. 13006–8; Exhibit 3843.
- <sup>375</sup> Regan testimony, June 5, 2013, p. 13008.
- <sup>376</sup> Exhibit 1093.
- <sup>377</sup> Exhibit 1093.
- <sup>378</sup> Rod Caughill testimony, March 14, 2013, pp. 1664–5.
- <sup>379</sup> Exhibit 1093.
- <sup>380</sup> Rod Caughill testimony, March 14, 2013, pp. 1667–8.
- <sup>381</sup> Exhibit 48.
- <sup>382</sup> Exhibit 48; Rod Caughill testimony, March 14, 2013, p. 1669; Dell'Aquila testimony, March 20, 2013, pp. 2200–1.
- <sup>383</sup> Exhibit 51, p. 1 of 4 (Tobias Report).
- <sup>384</sup> Exhibit 51, p. 2 of 4 (Tobias Report).
- <sup>385</sup> Dell'Aquila testimony, March 20, 2013, pp. 2204–5.
- <sup>386</sup> Exhibit 51, p. 3 of 4 (Tobias Report).
- <sup>387</sup> Exhibit 51, p. 3 of 4 (Tobias Report); Dell'Aquila testimony, March 20, 2013, p. 2204.
- <sup>388</sup> Exhibit 51, p. 3 of 4 (Tobias Report).
- <sup>389</sup> Exhibit 51, p. 2 of 4 (Tobias Report).
- <sup>390</sup> Exhibit 51, p. 3 of 4 (Tobias Report).
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- <sup>392</sup> Saffarini testimony, May 30, 2013, pp. 12437–8.
- <sup>393</sup> Saffarini testimony, May 29, 2013, pp. 12406–7.
- <sup>394</sup> Exhibit 51, p. 3 of 4 (Tobias Report).
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- <sup>398</sup> Exhibit 51, p. 2.
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- <sup>400</sup> Dell'Aquila testimony, March 20, 2013, pp. 2208–9.
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- <sup>403</sup> Dell'Aquila testimony, March 20, 2013, p. 2213.
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- <sup>412</sup> Dell'Aquila testimony, March 20, 2013, pp. 2218–19.
- <sup>413</sup> Dell'Aquila testimony, March 21, 2013, p. 2321.
- <sup>414</sup> Dell'Aquila testimony, March 21, 2013, pp. 2218, 2342–3.
- <sup>415</sup> Dell'Aquila testimony, March 21, 2013, p. 2324.
- <sup>416</sup> Iamonaco testimony, March 21, 2013, pp. 2489–93, 2496, 2505, 2509.
- <sup>417</sup> Iamonaco testimony, March 21, 2013, pp. 2510–12.
- <sup>418</sup> Saffarini testimony, May 30, 2013, pp. 12442–3.



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- <sup>420</sup> Saffarini testimony, May 30, 2013, pp. 12572–3.
- <sup>421</sup> Rod Caughill testimony, March 14, 2013, pp. 1678–9.
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- <sup>423</sup> Leistner testimony, March 27, 2013, p. 3382.
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- <sup>440</sup> Leistner testimony, March 27, 2013, p. 3432.
- <sup>441</sup> Rod Caughill testimony, March 19, 2013, pp. 1988–91; Leistner testimony, March 28, 2013, p. 3627.
- <sup>442</sup> Exhibit 6-8.
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- <sup>444</sup> Exhibit 6-8.
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- <sup>446</sup> Bauthus testimony, March 25, 2013, pp. 2895–6.
- <sup>447</sup> Bauthus testimony, March 25, 2013, p. 2899.
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- <sup>449</sup> Exhibit 2082; Exhibit 2083; Leistner testimony, March 27, 2013, pp. 3388–91.
- <sup>450</sup> Exhibit 430.
- <sup>451</sup> Exhibit 1434.
- <sup>452</sup> Exhibit 1434; Regan testimony, June 5, 2013, p. 13009; Fazekas testimony, March 12, 2013, p. 1167.
- <sup>453</sup> Fazekas testimony, March 12, 2013, p. 1168.
- <sup>454</sup> Regan testimony, June 5, 2013, pp. 13007–8.
- <sup>455</sup> Exhibit 3845.
- <sup>456</sup> Exhibit 1434.
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- <sup>458</sup> Leistner testimony, March 27, 2013, pp. 3391–2.
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- <sup>462</sup> Leistner testimony, March 27, 2013, pp. 3408–9.
- <sup>463</sup> Rod Caughill testimony, March 14, 2013, pp. 1689–92; Exhibit 430.
- <sup>464</sup> Exhibit 52.
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- <sup>467</sup> Exhibit 410.
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- <sup>472</sup> Exhibit 455; Rod Caughill testimony, March 14, 2013, pp. 1699–1700.
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- <sup>476</sup> Meyer testimony, April 4, 2013, pp. 4058–62, 4069–70; Exhibit 2084; Exhibit 410.
- <sup>477</sup> Meyer testimony, April 4, 2013, pp. 4069–72.
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- <sup>481</sup> Meyer testimony, April 4, 2013, p. 4120.
- <sup>482</sup> Meyer testimony, April 4, 2013, pp. 4121–8.
- <sup>483</sup> Meyer testimony, April 4, 2013, pp. 4065, 4075; Exhibit 60; Exhibit 63.
- <sup>484</sup> Rod Caughill testimony, March 20, 2013, p. 2066; Exhibit 60.
- <sup>485</sup> Exhibit 60.
- <sup>486</sup> Meyer testimony, April 4, 2013, pp. 4137–40.
- <sup>487</sup> Exhibit 63; Meyer testimony, April 4, 2013, pp. 4078–9.
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- <sup>489</sup> Meyer testimony, April 4, 2013, pp. 4188, 4190–1.
- <sup>490</sup> Meyer testimony, April 4, 2013, pp. 4075, 4080.
- <sup>491</sup> Exhibit 65.
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- <sup>499</sup> Meyer testimony, April 4, 2013, p. 4096; Exhibit 1876.
- <sup>500</sup> Meyer testimony, April 4, 2013, pp. 4096–7; Exhibit 1876, “S3.”
- <sup>501</sup> Meyer testimony, April 4, 2013, p. 4096–7.
- <sup>502</sup> Exhibit 65.
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- <sup>504</sup> Exhibit 65.
- <sup>505</sup> Meyer testimony, April 4, 2013, p. 4232.
- <sup>506</sup> Exhibit 65.
- <sup>507</sup> Caughill testimony, March 14, 2013, pp. 1717–20; Exhibit 454.
- <sup>508</sup> Caughill testimony, March 14, 2013, pp. 1745–6.
- <sup>509</sup> Leistner testimony, March 27, 2013, pp. 3418–24.
- <sup>510</sup> Leistner testimony, March 27, 2013, pp. 3267–8.
- <sup>511</sup> Leistner testimony, March 27, 2013, p. 3395.
- <sup>512</sup> Leistner testimony, March 27, 2013, p. 3402.
- <sup>513</sup> Leistner testimony, March 27, 2013, p. 3433.

SECTION

# IV

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## The Retirement Living Years 1999–2005

*Leaks from the rooftop parking deck were an ongoing issue in the Mall during the period of NorDev's ownership. In spite of this problem, NorDev spent relatively paltry amounts of money to maintain the roof.*



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## Background to Retirement Living

### The genesis and launch of Retirement Living

Non-Profit Retirement Residences of Elliot Lake (Retirement Living) was incorporated as a not-for-profit corporation in February 1991. It carries on business as Elliot Lake Retirement Living.

As I will discuss in greater detail later in this Report, in 1999 Retirement Living incorporated a for-profit subsidiary, NorDev, for the purpose of taking title to, and owning, the Mall and the Hotel. While these corporate entities are technically distinct, they shared common boards of directors and managers for the period that Retirement Living owned the Mall and the Hotel. Unless otherwise specified, a reference in the Report to Retirement Living also includes, where applicable, a reference to NorDev. The reader will see that I make distinct reference to the respective entities when doing so is necessary for a proper description of the evidence.

The roots of the Elliot Lake retirement living program extend back to 1987, when a committee was struck, under the auspices of the City's Economic Development Committee, to address what was already a surplus of housing in Elliot Lake. Even before the uranium mine closures of 1990, the mining companies had built too many homes in the area. The original purpose of the retirement living program was to fill those houses. In the 1980s, even newly built homes were sitting vacant.<sup>1</sup>

Initially, very few resources were devoted to either the concept or the committee's work. Denison Mines Corp., Rio Algom Mines Ltd., and the City of Elliot Lake were each asked to contribute \$25,000, which allowed the program to start in 1987 with an initial \$75,000 advertising budget. At this time, the mining companies not only owned their own housing properties but also managed the rentals, though the whole concept was marketed as the Elliot Lake retirement living program.

The situation changed in 1990, when the two primary mining companies began closing their mines in and around Elliot Lake. The closure of the Denison and Rio Algom mines had a devastating impact on the community, and the situation was viewed as a crisis.<sup>2</sup> As result of the closure of the mines, 4,500 full-time mining jobs were eliminated and approximately 4,000 secondary jobs were expected to be affected.<sup>3</sup> In addition, the City stood to lose 45 percent of its tax base, but the service requirements and other demands on the municipality were not proportionately reduced.<sup>4</sup>

As a preliminary response to this impending economic disaster, the City commissioned a study, funded by the Ministry of Northern Development, to determine the feasibility of transitioning Elliot Lake into a retirement community. The study concluded that, in light of the abundance of quality housing and apartments, this objective could be feasible.<sup>5</sup> The logic behind attracting senior residents to Elliot Lake was to bring in people to occupy the housing that was being abandoned by miners. Moreover, these residents, being self-sufficient retirees with pensions and/or savings, had the added advantage of belonging to a demographic that did not need a job in a community where positions were suddenly scarce.<sup>6</sup>

After its incorporation, Retirement Living was viewed as the vehicle that would salvage the economic viability of Elliot Lake by weaning it from its dependence on the mining industry and giving it a new vocation and renewed vigour. As stated in its letters patent, the corporate objectives of Retirement Living are

- (a) To provide and operate affordable housing units, with or without any public space, recreational facilities, and commercial space or buildings appropriate thereto, primarily for senior citizens of low or modest income in a manner that provides improved quality of life and that supports the economic base of the City of Elliot Lake.
- (b) To ensure the timely delivery of needed services for such housing units.<sup>7</sup>



A not-for-profit company has no shareholders; rather, it has members. A defining characteristic of a not-for-profit corporation, such as Retirement Living, is that its members are not to derive any benefit financially from their membership in the corporation.<sup>8</sup>

Mayor George Farkouh testified that there were two primary reasons for administering the retirement living program through a corporation rather than the municipality: an arm's-length corporation would pay property taxes; and an arm's-length corporation, with representation from the community, could more effectively manage the properties.\*

## **Retirement Living gets off the ground with 1,450 properties and \$3.5 million**

The initial capital funding used to launch the Retirement Living project came from the Ontario government, which made available \$7 million to get the corporation off the ground.<sup>9</sup> The Commission heard evidence that Retirement Living used \$3.5 million of these funds to acquire properties from Denison. This company, which was not in a strong financial position, initially proposed selling units to Retirement Living for \$15,000 each. Following a lengthy negotiation, Retirement Living ultimately acquired 900 units from Denison for \$3.5 million.<sup>10</sup>

Rio Algom was in a healthier financial condition. In an agreement negotiated with Revenue Canada and Elliot Lake, rather than selling properties to Retirement Living, it transferred 550 of them to the City of Elliot Lake in exchange for a tax receipt.<sup>11</sup> Elliot Lake subsequently transferred the properties to Retirement Living. As a result, Retirement Living began operations in 1991 with 1,450 properties and capital of \$3.5 million.<sup>12</sup>

## **Composition of the membership of Retirement Living**

The composition of the corporate membership of Retirement Living was clearly structured to include representation from interested parties within Elliot Lake. Specifically, the membership includes

- two members appointed by City Council;
- three tenants of Retirement Living properties;
- two members of the community at large, excluding tenants of Retirement Living properties;
- a member of Huron Lodge, an assisted living facility for seniors;
- a member of the board of St. Joseph's General Hospital;
- a member of the Elliot Lake Chamber of Commerce; and
- representatives of Denison and Rio Algom.<sup>13</sup>

The Retirement Living Board of Directors is made up of the members of Retirement Living.<sup>14</sup> The purpose of having representation from these parties was, according to Elliot Lake's chief administrative officer (CAO) at the time Retirement Living was created, to "ensure ... that there would be people with differing backgrounds and expertise coming to the table" and that there was a cross-section of input.<sup>15</sup>

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\* Farkouh testimony, May 2, 2013, pp. 8002–5; Mr. Farkouh acknowledged during his testimony that the City could have compensated for lost property tax revenue through the rental income that it would receive from tenants.

## Retirement Living and the City of Elliot Lake were closely linked

The requirement that City Council appoint two members of the Retirement Living Board of Directors is but one indication of the close relationship between the municipal government of Elliot Lake and Retirement Living. More fundamentally, the Commission heard ample evidence that Retirement Living and the City were both deeply and jointly committed to the common purpose of saving Elliot Lake from economic ruin. The councillors who sat on the Retirement Living Board of Directors were called “representatives” of the City.<sup>16</sup>

Mayor Farkouh, who served on the Retirement Living Board of Directors for many years as a representative of council, testified that Retirement Living was created to “serve the best interests of Elliot Lake” and to help the city “grow and survive from becoming a ghost town.” He agreed that Retirement Living and the City shared the goal of fostering a healthy economy.<sup>17</sup> In his words, he saw his role on the board as making sure that “Retirement Living is always acting in the best interest of the taxpayers of Elliot Lake.”<sup>18</sup> Another witness testified that, because Retirement Living was a key player in the Elliot Lake economy and viewed as “essential” to the City’s survival, the Retirement Living Board of Directors included representatives from the City of Elliot Lake.<sup>19</sup>

In 1996, Retirement Living again added to its housing stock in a transaction that further exemplified the closeness between Retirement Living and the City. At that time Rio Algom, which owned approximately 96 housing units in a series of four-storey buildings, had made an application to the City to tear down the buildings. Instead, the City transferred the units to Retirement Living for a dollar, on the condition that Retirement Living invest \$450,000 to rehabilitate the units. Ultimately, Retirement Living invested approximately \$700,000–\$800,000 to restore them.<sup>20</sup>

## Management of Retirement Living

The first general manager of Retirement Living was Bill Morris, who hired the initial staff and generally began its operations.<sup>21</sup> In 1993 Richard Kennealy was hired as the general manager – a position he continued to hold at the time of his testimony before the Inquiry. In that role, he reports to the Board of Directors of Retirement Living. Among other responsibilities, the general manager directs the operations of Retirement Living, prepares business plans, and promotes the interests of the corporation with governments, the community, and the public at large.<sup>22</sup>

Rhona Guertin was hired in December 1997 as the finance and business development manager, a position she continued to hold at the time of her testimony. She reports to the general manager. She viewed her role as managing the finance department and being the “project person” whenever business development ideas arose. She carried out the background research, feasibility studies, and preliminary plans to the point where they could become actual operations. She looked at operations from a financial perspective.<sup>23</sup>

Richard Quinn held the position of property manager from 1991 until 2010. He was responsible for all the physical assets of the corporation, ranging from capital expenses and improvements to the buildings through overseeing daily maintenance and custodians to preparation for move-ins and move-outs. As he said in his testimony: “If you could physically touch it, I took care of it. I ensured its viability.”<sup>24</sup>

## Confidentiality within Retirement Living obstructed the flow of information to the City of Elliot Lake

The Commission heard evidence that the purpose of having a corporation, rather than the municipality, administer the retirement living program was because “it would be logical to do that as a separate housing corporation type of entity ... because ... while it was assisting the City ... it wasn’t the City itself, in terms of [being run by City Council].”<sup>25</sup> Fred Bauthus, the City’s chief administrative officer, was asked whether a desire for confidentiality was part of the rationale for this arrangement. He replied: “I would hesitate to say.” He could not recall that confidentiality was a specific argument at the time.<sup>26</sup>

Although the desire for confidentiality may not have been one of the rationales for establishing Retirement Living, it appears to me that confidentiality was – from the outset – a defining characteristic of the way it conducted its affairs. Although the practice is not uncommon in non-public corporate governance, every member of the Board of Directors was required to sign a confidentiality agreement related to business under consideration by the board.<sup>27</sup>

On January 30, 1997, the corporate secretary of Retirement Living, Douglas Kearns, issued a report intended to provide all directors of Retirement Living, including new directors, with an understanding of their roles and responsibilities.<sup>28</sup> It stated that individual directors had the responsibility “to respect the confidentiality of matters considered by the Board or coming to their notice or attention as directors which are of a confidential or private nature.”<sup>29</sup> The report also attached the template of an agreement and undertaking respecting confidentiality of information provided to the Board of Directors (the undertaking). It provided in part:

I understand that in the course of my role as a director of Elliot Lake Retirement Living I will receive information that I must treat as confidential.

The regulations that follow are not intended to discourage me from speaking out about Elliot Lake Retirement Living and my role as a Director.

However, I will respect the following guidelines:

1. Written materials provided to me are not to be shared or distributed.
2. Opinions and voting of individual Directors are not to be commented on.
3. Any issues dealing with employees in general, or a particular employee[,] are not to be commented on.
4. Any ongoing negotiations by the Board or matters that have not come to a vote at the Board are not to be commented on.<sup>30</sup>

The Commission heard somewhat divergent interpretations of the scope of the confidentiality obligations imposed on the directors of Retirement Living. For example, Mr. Kennealy testified that board members did talk about Retirement Living business on a regular basis. He acknowledged, however, that a board member would interpret the report from Mr. Kearns and the undertaking as meaning that directors were responsible for respecting the confidentiality of matters considered by the board.<sup>31</sup> Mr. Kennealy further stated that, if a matter came before the board and had not yet been voted on, there was an expectation that it would not be discussed outside the confines of the board.<sup>32</sup>

Mr. Farkouh testified that there was always a flow of information between the community, City Council, and Retirement Living. He said he would advocate for the City’s interests and assert council’s position on matters that came before the Retirement Living board.<sup>33</sup> However, the undertaking prevented Retirement Living board members from even commenting on matters that were before the board and that had not yet been voted on. It is therefore not clear how a council representative could adhere to his or her obligation as a board member and,



at the same time, advise council of the matter and receive opinions or instructions. At most, it seems to me, a City representative would have to assume or guess council's position on a matter before the Retirement Living board. Under examination from Commission counsel, Mr. Farkouh acknowledged this tension:

- Q. So what you're telling me sir, if I understand you correctly, is that you knew what Council meant [on a matter before the Retirement Living Board] simply because you knew, and you didn't have to ask them; is that fair?
- A. Well, yes, that's fair.<sup>34</sup>

Rick Hamilton, who was a City Council representative on the Retirement Living Board of Directors from 2003 until 2009, testified that he did not report to council on matters that were before the board. Like Mr. Farkouh, he acknowledged that councillors could not provide their opinion on matters before Retirement Living if the City's representatives on the board did not report to them:

- Q. But how was it – how would members of Council know what the issues were that were coming up before the Board of Retirement Living if you didn't report to them?
- A. Well, I can't answer that question.
- Q. Well, you'll agree with me they couldn't, right?
- A. No.
- Q. You'll agree with me?
- A. Yeah.
- Q. So what I am trying to understand is how you could have been seen to be a representative of the City if the City didn't know, if Council didn't know what was being discussed, wasn't advised what the issues were and was not given an opportunity to tell you what their views were?
- A. Well, they were more than willing to tell me what their views were.
- Q. But it –
- A. I would be happy to bring that to the Board, sure.
- Q. But they couldn't tell you what their views were about things they didn't know about, right?
- A. Well, you have to be more specific than that. I'm not sure what –
- Q. Leaks on the roof. Did any members of Council while you were a member of the Board of Retirement Living ever tell you, give you any idea of what, if anything, you ought to be doing, what Retirement Living ought to be doing with respect to leaks at the mall?
- A. No.<sup>35</sup>

Mr. Hamilton testified that he would not disclose information that he obtained as a director of Retirement Living if the information could cause harm to the business of Retirement Living.<sup>36</sup> He said there were occasions when Mr. Kennealy and Ms. Guertin met privately with members of City Council to share information they did not want to become public. If he wished to attend such a meeting, he signed a non-disclosure agreement that required him to keep information presented there confidential.<sup>37</sup>

Evidently, councillors who did not agree to sign the non-disclosure agreement could not attend the private meetings with Retirement Living. The Commission heard evidence from Councillor Don Denley that he did not attend any meetings of the Retirement Living board because he was asked to sign a non-disclosure agreement as a precondition to attending a meeting.<sup>38</sup> This agreement, as he understood it, would have prohibited him from disclosing any information obtained at a board meeting.<sup>39</sup>

The Commission heard other evidence that the City representatives on the board did not discuss matters before the board at council meetings. Mr. Bauthus testified that, during his tenure of more than 10 years as chief administrative officer, the councillors who sat on the board never reported back to council, the CAO, or City staff about issues discussed or decisions made at the board. Mr. Denley testified that, during his time on council, from 2003 to 2006, City Council representatives on the board did not raise issues involving Retirement Living at council meetings.<sup>40</sup>

This trend continued after Retirement Living sold the Mall. Al Collett, who became a member of council in 2008, testified that the City Council representatives on the board of directors did not report to council on the activities of Retirement Living. He further testified that council did not give instructions to those representatives on decisions to be made in relation to Retirement Living.<sup>41</sup> In 2011, Councillor Tom Farquhar resigned as a City representative on the Retirement Living board because he did not think the confidentiality restrictions placed on board members were appropriate for a representative of City Council. The City accepted Mr. Farquhar's resignation and appointed an alternative representative.<sup>42</sup>

I conclude that the confidentiality obligations imposed on the City representatives who were members of the Retirement Living Board of Directors materially hindered them from fulfilling the very purpose for which they were on the board: to represent the council duly elected by the people of Elliot Lake and to advance the interests of the public.

**Unfortunately, the City seemingly did not consider – or did not adequately appreciate – the possible impact of its councillors' obligations as directors of the Retirement Living and the ramifications of those obligations on the ability of councillors to discharge their duties as council members.**

It is correct, as counsel for the City pointed out, that members of the board had fiduciary obligations to Retirement Living.<sup>43</sup> However, it is not the law that those fiduciary obligations necessarily include a blanket obligation of confidentiality with respect to all information coming their way as members of the board. Rather, board members are required to keep confidential any information which, if disclosed, would harm the corporation. Retirement Living chose to impose a blanket ban on all members of the board, and neither the City nor its appointees to the board objected to it.

Unfortunately, the City seemingly did not consider – or did not adequately appreciate – the possible impact of its councillors' obligations as directors of the Retirement Living and the ramifications of those obligations on the ability of councillors to discharge their duties as council members. Councillors who did not sit on the board also had difficulty obtaining information about Retirement

Living. In April 2005, Mr. Denley requested the minutes from the meetings of the Retirement Living board. Mr. Kearns responded by indicating that Retirement Living was not a public company and that its "records, minutes, financial statements etc. are not public documents, and there is no requirement that they be produced." Mr. Kearns directed Mr. Denley to make requests for such information to the City's representatives on the Retirement Living board.<sup>44</sup>

There is no doubt that, to varying degrees, depending on the circumstances, the law permits, and common sense allows, a not-for-profit corporation the justifiable discretion to conduct some of its business in a confidential manner when necessary to protect its interests. However, as Mr. Farkouh testified, Retirement Living is "part of the fabric of the community."<sup>45</sup> It remains to this day a unique corporation with a corporate purpose that ties it inextricably to the City of Elliot Lake. In these circumstances, Retirement Living's insistence on an overarching application of the confidentiality requirement resulted, in my opinion, in a disenfranchisement not only of the citizens of Elliot Lake but of all provincial taxpayers, particularly when public funds through grants and tax exemptions constituted its unique source of initial financing.

As a general proposition, there was logic and a clear purpose in structuring the retirement living program around a distinct, not-for-profit corporate entity. Retirement Living certainly appears to have functioned admirably well in achieving its stated objectives. However, I am of the view that its hermetic governance and insular behaviour may well have had a materially deleterious impact on the Mall and the community's appreciation of its problems. That unfortunate result was particularly evident when Retirement Living emerged as a prospective purchaser and, later, as owner of the Algo Mall.

At the time of Retirement Living's incorporation in 1991, the three directors representing the tenants of its properties and the two directors representing the community at large were elected to those positions at separate public meetings of the tenants and the community. By supplementary letters patent in 2011, these elections ceased and the affected directors were thereafter appointed by the board of directors. Although this change occurred after the sale of the Mall to Eastwood, it serves as a further illustration of the disenfranchisement I speak of. Five of the directors are now chosen not by the citizens of Elliot Lake but by the corporation's board in its discretion.

## **Retirement Living buys the Algo Centre**

### **Algocen intends to shut the Hotel**

In the spring of 1997, Robert Leistner, general manager of Algocen, delivered disturbing news to Mayor Farkouh and Mr. Kennealy. He told them that Algocen was losing money on the Hotel and therefore intended to close it and ultimately tear it down.<sup>46</sup>

The Hotel was a vitally important part of the financial health of both Retirement Living and the City. Retirement Living used it to house prospective residents who came to tour the community.<sup>47</sup> The other hotel options in Elliot Lake were of significantly lower calibre.<sup>48</sup> From the City's point of view, the mayor worried about the economy of Elliot Lake spiralling into failure without the Hotel.<sup>49</sup>

Mr. Kennealy testified that, at some point, Algocen broached the idea of Retirement Living, as the largest user, buying the Hotel.<sup>50</sup> Over the next few months the issue of the Hotel's closing was discussed between Mr. Kennealy and his staff as well as with the mayor, City Council, and City staff.<sup>51</sup> On October 29, 1997, the Retirement Living board was given a presentation on regional development strategy. A discussion took place at the meeting concerning the feasibility of Retirement Living becoming involved with the Algo Mall and Hotel. The board directed Mr. Kennealy to investigate its potential involvement in the future of the Algo Hotel and report back. Mr. Kennealy did not believe the board was considering ownership as a possible option; rather, he felt it wanted to gain an understanding of the problem it faced.<sup>52</sup>

Following on from the discussions among the interested parties about the future of the Mall and Hotel,<sup>53</sup> a meeting was arranged with Mr. Leistner. Mr. Farkouh said he would have directed Mr. Bauthus to arrange a meeting to gain some understanding of Algocen's real intentions for the Hotel and to know more about its long-term plans for the Mall.<sup>54</sup>



## Algoma is serious about closing the Hotel

On December 5, 1997, a meeting called at the Algocen offices in Sault Ste. Marie included Mr. Leistner, Mayor Farkouh, Mr. Bauthus, and Mr. Kennealy. The meeting revealed that, if nothing changed, Algocen was serious about closing the Hotel.<sup>55</sup> The mayor came away from the meeting with the understanding that, because Algocen was seeing a lack of enthusiasm from some merchants, it was not prepared to invest any more resources to upgrade the building or recruit new retail business to the Mall. He concluded it would be just a matter of time before Algocen decided its investment was no longer viable and would take steps beyond the City's control – to shut down the Mall.<sup>56</sup>

Mr. Kennealy also believed that Algocen was not fully committed to the long-term commercial success of the Mall. He based this conclusion in part on the fact that Algocen was reorienting its business activities to the south at the same time as it was divesting its other assets in Northern Ontario.<sup>57</sup> The importance of the Mall and the Hotel to Elliot Lake generally, and to Retirement Living specifically, was undisputed. According to the mayor, the loss of the major commercial retail and hotel complex would have been absolutely devastating to the community.<sup>58</sup> Retirement Living's success depended on marketing the City, so anything that had a negative impact on the City and its services would necessarily have adverse consequences for Retirement Living. In his testimony, Mr. Bauthus agreed that Retirement Living was the major economic force in the City.<sup>59</sup> In short, it was widely believed that what was bad for Retirement Living would also be bad for the City of Elliot Lake.

In order to better understand the situation they were facing, the participants at the meeting agreed that a study should be initiated whose terms of reference\* would include an examination of both the Hotel and the Mall.<sup>60</sup> Mr. Bauthus referred to the study as a retail study to better understand the various issues with regard to retail in the City, including, among other things, how the Mall worked and how it could be improved.<sup>61</sup>

## Retirement Living considers possible ownership of the Mall and the Hotel

On December 8, 1997, Mr. Bauthus faxed Mr. Leistner a copy of the terms of reference for this study as well as the CVs of the persons who were conducting it. The terms of reference were divided into phases:

- Phase I: Retail Study
- Phase II: Physical Building Inspection by engineers and Analysis of Information
- Phase III(a): Determination of Current Fair-Market Value

This valuation included an appraisal of the property to assist in determining a possible offering price for it.

- Phase III(b): Operational Review

This review included

- Identification, assessment, and ranking of the commercial rental space in Elliot Lake
- Assessment of the required space, based on demographics
- Assessment of the quality of leases of the property

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\* The only copy of the terms of reference that was available to the Commission was missing a page. That page described the retail study: Bauthus testimony March 26, 2013, pp. 2985-88.

- Phase IV: Analysis of Operational Viability of the Property

This analysis included

- A review of factors that may affect the operational viability of the Algo Mall and the Algo Inn, including possible sources of financing for the acquisition and possible ownership and management options of the property.

- Phase V: Reporting.<sup>62</sup>

Mr. Bauthus testified that he, in consultation with Mr. Kennealy, had probably prepared the terms of reference.<sup>63</sup> Mr. Kennealy agreed that it was inconceivable he would not have discussed them with Mr. Bauthus before they were finalized and sent to Mr. Leistner.<sup>64</sup>

The Commission heard somewhat divergent evidence about the underlying purpose of these studies. Mr. Kennealy testified that establishing a fair market value of the property, exploring possible sources of financing, and conducting a building condition assessment are consistent with exploring the possibility of purchasing the Mall and the Hotel. He did not agree, however, that Retirement Living was considering buying the property, though that outcome was conceivable.<sup>65</sup> Mr. Leistner, for his part, thought the purpose of the exercise was to determine the worth of the Mall and the Hotel in order to set a proper purchase price.<sup>66</sup> Mr. Bauthus, in contrast, recalled at the time of preparing the terms of reference that there were discussions about the possibility of Retirement Living purchasing the property.<sup>67</sup> As a potential purchaser, he testified, Retirement Living had an interest in having an assessment of the condition of the building and knowing its fair market value.<sup>68</sup> It seems clear that the City never seriously considered purchasing the Mall.<sup>69</sup> The terms of reference had a dual purpose, in Mr. Bauthus's view. They were meant both to evaluate the viability of the Algo Centre and, at least potentially, to further the possible purchase of the Mall and the Hotel by Retirement Living.<sup>70</sup> This dual-purpose position appears reasonable to me.

## Algocen maintains control over its information

The terms of reference specified that a team from the consulting firm KPMG in Sudbury would undertake the study. In addition, it was contemplated that, as part of the project, engineers would be retained to do the physical assessment.<sup>71</sup> Mr. Leistner, in a letter to Mr. Bauthus on December 11, 1997, agreed to the proposed terms of reference, subject to suitable measures being taken to adequately keep the affairs of Algocen confidential, including the physical condition of the building.<sup>72</sup> The information being sought by the City and by Retirement Living was information Algocen was not obligated to share with them.

Mr. Leistner required that KPMG sign a confidentiality agreement that would include, but would not be limited to, the following restrictions:

- i) All information presented, verbally or in print form to the KPMG team is strictly confidential and will not be reported to any other party in any form, without the prior written approval of Algocen;
- ii) In the case of i) above, where approval may be given, it would be conditional upon receipt of a further confidentiality agreement from said third party;
- iii) No pertinent information given to the KPMG Team will be copied, without the prior written approval of Algocen;
- iv) Any and/or all information, whether prepared, compiled or completed by the KPMG Team or otherwise, will be immediately returned and/or given, as the case may be, to Algocen forthwith upon demand.

In addition to those restrictions, Mr. Leistner retained the authority to approve the membership of the KPMG team and any changes to it. Any new members had to sign the confidentiality agreement. He specified that the reporting protocol for the physical inspection of the building would be determined when the engineer had been retained.<sup>73</sup>

As a further means of imposing confidentiality over Algocen's information, Mr. Leistner required that a non-disclosure agreement be entered into between Algocen and Retirement Living. In January 1998 he forwarded the proposed agreement to Mr. Kennealy.<sup>74</sup> It was subject to a number of amendments<sup>75</sup> before it was finalized and executed on behalf of Retirement Living and Algocen on May 12 and May 15, respectively.<sup>76</sup>

The non-disclosure agreement provided, among other things:

- that Retirement Living undertook that it would not, directly or indirectly, disclose or use, at any time, either during or subsequent to its investigation of the affairs of the corporation, any information acquired by it as a result of its investigation. The information could not be reported to anyone without the prior written approval of Algocen;
- that if Algocen withheld approval to pass on to nine elected officials and senior employees of the City of Elliot Lake a written report containing (a) a summary of the physical condition of the building, (b) a value of the facility, and (c) an oral explanation of the data, Retirement Living would be reimbursed up to \$12,000 for the cost of the summary of the condition of the physical building and up to \$8,000 for appraisal costs. Those nine elected officials and senior employees, all identified by name, included the mayor and the chief administrative officer;
- that if approval was granted, a further confidentiality agreement would be required from those named individuals;
- that no printed material provided could be copied without prior written consent; and
- that Retirement Living representatives with access to the information could only be persons who had the previous written consent of Algocen; they were required to acknowledge their understanding of the agreement and to give their covenant to strictly abide by its terms and conditions.<sup>77</sup>

Ms. Guertin and Mr. Kennealy both executed the necessary acknowledgements and covenants.<sup>78</sup> They were approved by Mr. Leistner to be the representatives of Retirement Living authorized to receive information from Algocen.<sup>79</sup> As a result of the confidentiality agreement, they were the only persons able to receive information about the property's value and business performance, as well as the physical condition of the building. If they wished to share information beyond themselves, they needed the approval of Algocen. This agreement would, in the absence of such permission, prohibit sharing information with the Retirement Living Board of Directors, which included City representatives.

Mr. Leistner's rationale for insisting on this rather strict and convoluted form of non-disclosure agreement was apparently rooted in information he received that elected members of City Council (Mayor Farkouh and Councillor Terry Croteau) might not be bound by a typical non-disclosure agreement where execution by persons in authority binds all members of an organization.<sup>80</sup> In any event, it appears it was an effective method of controlling the dissemination of information to Retirement Living and the City.



## Architects provide Retirement Living with a proposal for a building condition assessment

On January 30, 1998, Blaine Nicholls, a principal in the architectural firm of Nicholls Yallowega Bélanger, provided Ms. Guertin with a proposal for a building condition assessment for the Algo Mall.<sup>81</sup> In her testimony, she said she believed that someone else had made initial contact with Mr. Nicholls and she had informed him that she would be his contact person on the project.<sup>82</sup> Because she had begun working for Retirement Living only on December 1, 1997, she was not aware of the meeting that took place four days later. Mr. Kennealy told her about it in late December or early January. He explained the problem with the Hotel and its importance to Retirement Living, as well as Retirement Living's potential interest in the Hotel.<sup>83</sup>

In his proposal, Mr. Nicholls stated:

My understanding is that the acquisition of the building is being considered and, as part of a larger Phase 1 analysis, you are interested in establishing the condition of the building, any major deficiencies and the potential costs for repairs.<sup>84</sup>

Ms. Guertin testified that she did not tell Mr. Nicholls that Retirement Living was considering the purchase of the Mall and the Hotel because that was not her understanding of its intentions at that time.<sup>85</sup>

Later in the proposal, Mr. Nicholls noted that, with respect to the building structure: "It is assumed that the key issue will be the condition of the parking deck."<sup>86</sup> He cited Ms. Guertin in his testimony as the source of this information.<sup>87</sup> She had no recollection of being the source. She testified that, if she had been the source, it would have been on the basis of information she had received from Mr. Kennealy or Mr. Bauthus, or perhaps both of them.<sup>88</sup> Because these men were working closely on this matter, it is reasonable to conclude that both were aware that the condition of the parking deck was, potentially, a serious issue.

The reference in the letter of proposal to the possible acquisition of both the Mall and the Hotel is consistent with the purposes of the terms of reference referred to earlier. It is my conclusion that, by this time, Retirement Living was in fact exploring the possibility of purchasing the Mall and the Hotel and that Mr. Nicholls's letter was a true reflection of Retirement Living's intentions.

## The City agrees to pay for the retail study

The annual general meeting of Retirement Living took place on January 31, 1998. Mr. Kennealy drafted a report to the board, which included Mayor Farkouh and Councillor Croteau.<sup>89</sup> One section of the report set out a proposal for a "Community Retail and Hotel Study." The impetus for this study was stated to be Algocen's announcement that it intended to get out of the hotel business in Elliot Lake.<sup>90</sup>

Mr. Kennealy's report noted that there had been ongoing discussions with the City of Elliot Lake and Algocen with respect to vacancy rates in the Mall, limited retail options in the Mall, and the physical condition of the Mall.<sup>91</sup> As a consequence of these talks, he said, the three parties agreed to initiate a comprehensive review of the entire Algo Mall and Hotel complex. The structure of the study was set out as follows:

- Research
  - Inventory of retail and commercial spaces
  - Study of shopping habits and concerns of citizens
  - Scan of retail industry in Northern Ontario

- Review of chain-store requirement profiles
- Scan of the hotel industry in Northern Ontario
- Valuation of the Algocen Mall and Hotel
  - Detailed financials on the Mall and the Hotel
  - Review of in-place leases
  - Review of the physical structure
- Identification of possible solutions<sup>92</sup>

Commissioning this study appears to have been the first step in implementing the terms of reference.

Mr. Kennealy's report noted that the cost of the study would not be borne by Retirement Living except for the time he and Ms. Guertin spent on it.<sup>93</sup> The board approved the study.<sup>94</sup> Mr. Bauthus acknowledged that the City was interested in the retail information that the study would identify. He said that, because Retirement Living was considering the purchase of both the Mall and the Hotel, it was more interested than the City in the valuation of the properties.<sup>95</sup>

In order to get approval from the City, Mr. Bauthus prepared a report for council, dated March 6, 1998, titled *Review of Retail / Commercial Market in Elliot Lake*. The report recommended that the City enter into an agreement with Retirement Living to conduct this study and that the City pay for it.<sup>96</sup> The study would consist of a review of the retail / commercial space in Elliot Lake; the retail habits of the consumer in Elliot Lake; and the long-term viability of the Algo Mall and the Hotel.<sup>97</sup>

Mr. Bauthus did not disclose to council in his report that the contemplated work included a building condition assessment and a fair market evaluation of the Mall and the Hotel. In fact, there was nothing in the report to let council know that Retirement Living was considering buying the property. He was aware that the mayor knew of Retirement Living's interest in the property, but not whether the mayor had shared this information with council.<sup>98</sup> The City clerk, Larry Burling, agreed that if this interest had been mentioned, it would have been big news – so in all likelihood it had been kept quiet.<sup>99</sup> He testified that a reasonable reader of the report would not have been able to tell that the purpose of the \$30,000 earmarked for the Algo Centre would be primarily to assist Retirement Living in its pursuit of purchasing the property.<sup>100</sup> I agree.

The report's recommendations were adopted by resolution on March 9, 1998, and implemented by By-law 98-13, which was passed by council on March 23 that year. The by-laws authorized the mayor and the City clerk to enter into an agreement with Retirement Living for the provision of professional consulting services with respect to a retail / commercial study.<sup>101</sup> The agreement specified three different components to the study:

- Retail / commercial space database
  - A complete review of all the commercial space in Elliot Lake.
- Retail survey
  - Retirement Living to contract with the Elliot Lake Research Field Station to undertake a consumer survey.
- Algo Mall / Hotel
  - An assessment of the Mall and the Hotel to determine the physical condition of the Hotel and the Mall facilities and the fair market value of the property.

With respect to the Algo Centre component of the study, Retirement Living agreed to deliver to the City a summary of the physical condition of the building and a valuation of the facility. The budget for this part of the contract was \$30,000. The total budget was fixed at \$45,000, including \$4,000 for disbursements but excluding taxes.<sup>102</sup>

At the time the contract was signed, Mr. Bauthus expected that the City would be provided with the building condition assessment and the property valuation.<sup>103</sup> Ultimately, the City received neither.<sup>104</sup> The non-disclosure agreement signed by Mr. Kennealy and Ms. Guertin on May 12, 1998, effectively precluded Retirement Living from delivering the valuation of the facility and the summary of its physical condition to the City without the consent of Algocen.

Mr. Farkouh testified that he was unaware of the non-disclosure agreement until he reviewed documents in preparation for his evidence at this Inquiry.<sup>105</sup> Mr. Bauthus never saw the non-disclosure agreement and learned of it anecdotally sometime after its execution, but he could not say when.<sup>106</sup> In contrast, Mr. Kennealy explained that it was inconceivable he would not have discussed it with both of them, but has no documentation or specific recollection of doing so with either of them.<sup>107</sup> Ms. Guertin testified that she did not tell, nor was she aware of anyone telling, the City about the non-disclosure agreement.<sup>108</sup>

Mr. Farkouh said that as a member of the Retirement Living Board of Directors, he expected to have access to all the information in the possession of the managers of the corporation.<sup>109</sup> Mr. Kennealy did not know whether the Retirement Living board received a copy of the non-disclosure agreement, but he knew he would have spoken about it during a board meeting in May 1998.<sup>110</sup> The general manager's comments section of the minutes from that meeting included the following statement:

Considerable time has been invested in negotiating acceptable confidentiality agreements with Algoma Central Properties, Elliot Lake Retirement Living and the City of Elliot Lake to ensure all parties have a clear understanding of what can and cannot be disclosed to who.<sup>111</sup>

However, neither Mr. Farkouh<sup>112</sup> nor Mr. Bauthus<sup>113</sup> was aware of any negotiations concerning confidentiality agreements.

Given their positions within the municipal government and their experience in dealing with Algocen, Mayor Farkouh and Mr. Bauthus were the logical choices to be representing the City's interest with respect to confidentiality agreements and the most likely to have knowledge of the agreements. Since neither one was aware of them, I conclude that the City was excluded from the process that determined the scope and effect of the non-disclosure agreement. The non-disclosure agreement had the potential to allow Algocen to hide from the City any evidence of dangerous conditions uncovered during the building condition assessment. This possibility would clearly be contrary to the responsibilities of the City's representatives.

It further appears clear that City Council, at the time it authorized the expenditures, would have expected to receive a copy of the building condition assessment as well as a valuation of the property. Troy Speck, who was a member of City Council at the time, testified that if the City was paying for a building condition assessment, he would expect the City to receive it. He did not recall any discussions about Retirement Living not being able to deliver it.<sup>114</sup> Put simply, councillors could reasonably expect to receive what they were paying for. The fact that the City was paying for the study that included a building condition assessment further establishes the importance of the Mall to the City itself. Clearly, the City should have insisted on the right to obtain the results of the assessment. Unfortunately, it appears from the evidence that council could not have known it did not have the ability to obtain this information. There appears to be no reliable evidence that councillors were told otherwise – just as there is no evidence that the City even asked for this information.



As the City has subsequently acknowledged, in order for the information to remain confidential, it contracted to have the building condition inspection and the report paid for by the City but delivered only to Retirement Living. In their submission that the City was correct in not insisting that it be provided with a copy of the 1998 Nicholls Yallowega Bélanger report procured by Retirement Living under its agreement with the City, counsel for the City wrote:

Once again, the primary concern of the City and [Retirement Living] was confidentiality. Specifically, the Municipal Freedom of Information and Protection of Privacy Act, RSO 1990 CHAPTER M56, which came into force on January 1, 1991.

...

Since 1991, there have been well over 400 decisions by the Information and Privacy Commissioner relating to third party disclosure held by the City. Many of the decisions have supported the disclosure of the type of information that the City would have received had it performed the deliverables on its own.

To alleviate this concern, the City contracted with [Retirement Living] to protect the confidentiality of the information in support of the deliverables of the Agreement. There was nothing inappropriate or extraordinary about this arrangement. The City was simply acknowledging to private enterprise that it would not risk their private information and, further, that the applicable privacy restrictions did not support the City in obtaining this information.<sup>115</sup>

It is difficult to understand why a desire to dispel the fears of local business owners about the potential dissemination of private information made it necessary to impose a cloak of total secrecy over all of the operations of Elliot Lake Retirement Living, and the Mall's condition in particular. I fail to see any connection between the Mall's condition and the desire by private enterprise for confidentiality. The unfortunate consequences of this arrangement were to shield Retirement Living's internal operations completely from public scrutiny and to impair the City's ability to adequately address public safety.

### **Retirement Living examines the books and the building, but Algocen does not provide the Trow or Meyer engineering reports**

By letter from Mr. Leistner dated June 2, 1998, Ms. Guertin received copies of the Algo Inn income statements for the years 1993–97 as well as occupancy level reports from 1993 to April 1998.<sup>116</sup> This information appears to be the first set of documents that was shared with Retirement Living following the non-disclosure agreement.

Ms. Guertin testified that she met with Mr. Leistner on July 22, 1998. They discussed both the Mall and the Hotel operating numbers. The Hotel numbers showed net losses, whereas the Mall's figures were quite positive. The combined financial performance of the Hotel and the Mall was also positive. Ms. Guertin testified that it made more sense to purchase both properties, rather than just the Hotel, if a deal was going to be done.<sup>117</sup> She felt that, as a result of this analysis, the prospect of Retirement Living purchasing the Mall arose around this time.<sup>118</sup>

On July 23, 1998, a meeting was held at the offices of Retirement Living in the Mall. Present were Mr. Kennealy, Ms. Guertin, and Mr. Quinn from Retirement Living as well as Mr. Nicholls and Michael Luciw from Nicholls Yallowega Bélanger.<sup>119</sup> This introductory meeting took place before the building condition assessment had begun.

Mr. Nicholls's proposal stated that his firm would have overall leadership and responsibility for the architectural aspects of the study. The engineering firm of Halsall Associates Ltd. (Halsall) would have responsibility for structural aspects, while another engineering firm looked after the mechanical and electrical details.<sup>120</sup> Mr. Nicholls was informed by someone during the meeting that the parking deck appeared to be the main

problem: extensive long-term maintenance work had been costly, and the leaks had been going on for a long time.<sup>121</sup> He was also told that Retirement Living was interested in acquiring the Hotel.<sup>122</sup> He testified that although Retirement Living was his client, he was advised during the meeting that Algocen would make the final determination on the release of the report.<sup>123</sup> In addition, each of the consultants was asked to sign a non-disclosure agreement. Mr. Nicholls testified that, from his experience, this request was quite unusual.<sup>124</sup> In fact, Ms. Guertin agreed that anyone who touched this project had to sign an agreement of this sort.<sup>125</sup> As a consequence of this privacy issue, Mr. Nicholls was concerned about his ability to access the relevant available information in order to do the work. He was told access would not be a problem.<sup>126</sup>

However, the consultants who worked on the study never received any previous engineering reports, despite Mr. Luciw's request of July 30, 1998, to be provided with copies of construction drawings and any other pertinent reports or information.<sup>127</sup> This request was made to Ms. Guertin, who testified that she passed it on to Larry Liautaud, the Mall manager.<sup>128</sup> Mr. Nicholls made a further request on August 20, 1998,<sup>129</sup> and Mr. Luciw a final one on August 28, 1998.<sup>130</sup> This information would have allowed the consultants to get a better idea of the building in advance of their site visit.<sup>131</sup> Ultimately, they received only a partial set of structural and architectural drawings.<sup>132</sup>

Commission counsel provided Mr. Luciw with the three Trow reports referred to earlier in the Report. After reviewing them for the purpose of the Inquiry, he felt they were pertinent and should have been supplied.<sup>133</sup>

In contrast to the evidence of Ms. Guertin, Mr. Leistner said he was never asked for any previous consultant reports, such as the Trow or Meyer reports. Although he was not asked for them, he said he offered engineering reports to Mr. Kennealy, who turned them down, saying they were doing their own comprehensive report.<sup>134</sup> Mr. Kennealy disputed Mr. Leistner's evidence on the basis that it was not like him to turn down something he thought was critical.<sup>135</sup> Given Mr. Leistner's well-established penchant for confidentiality, it seems unlikely that he would offer these engineering reports without prompting. In any event, they were not produced despite specific requests for this type of information.

The actual site visit by Mr. Luciw and his consulting team took place on September 17, 1998.<sup>136</sup>

## **The Retirement Living board formally pursues the Mall and the Hotel**

On September 17, 1998, Ms. Guertin requested permission from Mr. Leistner to share information about the Hotel with the Retirement Living Board of Directors. The information concerned occupancy rates, room designs and layout, the 1997 year-end statement, and historical revenues and profit for the years 1993 through 1997. She hoped to include it in a report to the board, but the non-disclosure agreement required that she first request permission to do so. She informed Mr. Leistner that she would not include any information about the building condition assessment, which was ongoing, but would want to communicate it once Mr. Leistner had approved the assessment report.<sup>137</sup>

Mr. Leistner said his "approval" was not approval of the contents of the report but, rather, of the recipients with whom it could be shared. He wanted to ensure that all members of the Retirement Living board, and in particular the City representatives, were restricted from passing on the contents to the City or anyone else.<sup>138</sup>

On September 22, 1998, Mr. Leistner gave his consent for the Retirement Living board to receive the information about the Hotel.<sup>139</sup> It was delivered to board members at the September 24, 1998, meeting. The report indicated that the Hotel was an unprofitable business. It could, however, become profitable once management strategies that included capital improvements were initiated. The loss of more than 60 percent of the hotel rooms in

Elliot Lake could have a serious impact on both business and economic development in the community.<sup>140</sup> Mr. Kennealy told the board what Ms. Guertin had learned in July – that the Mall made a profit that more than covered the Hotel's loss. At first blush, then, it was worthwhile to explore the acquisition of both the Hotel and the Mall.<sup>141</sup>

During the meeting, the board directed the general manager to pursue opportunities related to local ownership of the Algo Mall and the Hotel and to report back at the next board meeting on November 19, 1998, before taking any action.<sup>142</sup> Mr. Kennealy said that "local ownership" really meant Retirement Living.<sup>143</sup>

Mr. Farkouh testified that he saw Retirement Living's interest in these properties as throwing a lifeline to the City, even though he regarded it as a high-risk project. If the deal failed, it could have jeopardized the entire Retirement Living program and, by extension, the community's survival.<sup>144</sup>

## Retirement Living has a secret meeting with City Council

On October 7, 1998, Ms. Guertin once again sought Mr. Leistner's permission to make a verbal report to City Council concerning the Hotel's break-even point and occupancy as well as the fact that it was losing money.<sup>145</sup> She included in her correspondence the text of what she proposed to say.<sup>146</sup> She informed Mr. Leistner that this information would be shared with council the next week at a meeting she described as "not a regular meeting of Council or a caucus meeting." She informed Mr. Leistner that "[w]e will remind Council of the sensitive nature of the information and that it is not to be disclosed to any one after the meeting."<sup>147</sup>

Exhibit 2158 is the retail study the City had commissioned Retirement Living to conduct in March 1998. It was dated October 1998 and entitled *City of Elliot Lake Retail Study: A Close Look at Retailing in Elliot Lake*. On the last page of the body of the report is a note: "We will discuss the potential directions and actions during our meeting on Tuesday, October 13th at 4:00."<sup>148</sup> Mr. Kennealy indicated that this note was his and that it was a communication to City Council.<sup>149</sup>

Ms. Guertin was certain that the October 13, 1998, meeting with council took place. She was the one who prepared most of the presentation that Mr. Kennealy gave there. Council was informed at this meeting what Retirement Living had learned about the Hotel, its bleak financial picture, and what the loss of those rooms meant to the community.<sup>150</sup> She testified that council members were ecstatic when they were told that Retirement Living was looking at the possibility of buying the entire complex.<sup>151</sup>

The fact that the meeting was held cannot be disputed. Because it was private, with no members of the press or the public present, according to Ms. Guertin, it was not a meeting of council sanctioned under the *Municipal Act*.<sup>152</sup> She described it as "a meeting between two organizations."<sup>153</sup>

The *Municipal Act* as it then stood stated, in section 55(3): "Except as provided in this section, all meetings shall be open to the public." Section 55(5) set out a series of exceptions for those occasions when a meeting could be closed to the public. Mr. Bauthus agreed that the meeting proposed by Ms. Guertin would not meet any of those exceptions.<sup>154</sup>

The Commission was provided with the minutes of all the meetings of council between the end of September 1998 and year's end. One council meeting was held at 7 p.m. on October 13, 1998, three hours after the time Mr. Kennealy's note indicated the private meeting with council would begin. Mr. Kennealy and Ms. Guertin were not shown as attendees. The minutes do not reveal any discussion of the affairs of Retirement Living.<sup>155</sup>



Mr. Kennealy thought the meeting did not take place in the council chambers but, rather, in a small conference room.<sup>156</sup> He said the retail study was reviewed, along with the fact that Retirement Living was considering purchasing both the Mall and the Hotel<sup>157</sup> even though the Hotel was losing money but needed to be kept alive.<sup>158</sup> He testified that the meeting took this unusual form simply because council had been invited to “sit down and review this ... and they would let us know when and where.”<sup>159</sup> Ms. Guertin said she had not been to this type of meeting before. Subsequently, however, she had attended meetings where both staff and councillors were present. Some of these meeting were public and some were not.<sup>160</sup>

## Consultants reports regarding the building’s structural integrity provided to Retirement Living, but not City Council

On October 8, 1998, Mr. Luciwx faxed Ms. Guertin a copy of the first draft of the building condition assessment dated October 7, 1998,<sup>161</sup> which included the Halsall report.<sup>162</sup> The draft was sent to Mr. Leistner on October 14, 1998, by Ms. Guertin.<sup>163</sup> Mr. Kennealy said he would have read it when it was received by Retirement Living.<sup>164</sup> He did not think he told council about the report, nor did he think the subject came up at the October 13, 1998, meeting with council.<sup>165</sup>

The final report by Nicholls Yallowega Bélanger, which included Halsall’s report as an appendix, was dated November 12, 1998.<sup>166</sup> That report contained this observation about the parking deck structure:

A rooftop parking deck structure is located on the third floor of the building. The deck surface generally consists of a concrete topping wear layer installed over precast concrete slabs. It is our understanding that the integrity of the waterproofing ability of this structure has been a continuous maintenance issue. From our review of the existing drawings and visual inspection, the presence of an integral waterproofing membrane could not be determined. Based on the extent of surface applied sealants on the concrete topping wear layer, we suspect that the structure was constructed without an integral waterproofing membrane. Maintenance staff confirmed the absence of a waterproofing membrane during repair work that has been recently executed for their parking deck maintenance and concrete repair program.

A more detailed review of the parking deck structure is provided in Appendix ‘A’. Note there are concerns and recommendations expressed by the structural consultant regarding the structural integrity of the concrete slabs. Recommendations are provided for conducting additional inspection and testing to accurately assess the extent of any deterioration. The results of this additional inspection and testing may have significant cost implications if the structural integrity of the slabs has been affected. Concerns and restrictions regarding live loadings and structural capacities are also indicated.<sup>167</sup>

Halsall provided a more detailed analysis of the parking deck structure, adding that further studies should be conducted to determine the proper remediation program. The report’s relevant portions state:

### 2.0 PARKING DECK STRUCTURE

The concrete topping over the precast slabs has been saw cut and caulked at 4’, 8’ or 12’ intervals corresponding to the slab widths. The concrete topping has cracked at several locations where saw cuts were not provided. At these locations, the cracks have been routed and caulked. We observed several locations where the topping was previously repaired. The expansion joints in the roof deck have been recently repaired.

We have had discussions with the building maintenance staff who have indicated that there is a layer of rigid insulation below the concrete topping over the precast concrete slabs. This is consistent with the original details shown on the structural drawings. The maintenance staff also noted that this rigid insulation was not continuous over the parking deck at some locations.

From the underside of the parking deck, we observed some corrosion of the structural steel beams and columns, indicating past leaking of the deck. We were unable to review the condition of the underside of the precast concrete slab panels as they were covered with foiled insulation and wire mesh.

We understand that the parking deck is being sanded during the winter months. However, there is evidence of salt contamination where the snow was stockpiled off the parking deck. We understand that there is no existing waterproofing protection system. It is our opinion there may be chloride contamination in the precast parking deck slabs.

The cause of corrosion is usually chlorides in the concrete (from various sources but primarily road salt) combined with water and oxygen. Chloride contamination acts to break down the protection against corrosion which concrete normally provides for steel.

At this time we cannot render an opinion as to what the true state of the deck is, nor what long term cost could be expected. However, given the age of the structure, deterioration of the concrete slabs may begin to occur now or in the near future. This could result in significant maintenance costs for the remainder of the building life.

There was no evidence of structural distress or excessive deterioration of the structural steel framing observed at the time of the review.

#### 2.1 Further Studies

We advise further studies be carried out to accurately assess the extent of corrosion, if any, of the reinforcement in the precast slabs. A work plan for repair and associated costs could be established once the condition of the steel structure and precast slabs are determined.

The following details the study:

- Drill and obtain powder samples at the underside of the precast concrete slabs at selective locations. The extent of chloride contamination will be determined by lab tests;
- Expose and visually inspect the precast concrete slab prestressing strands at selective locations;
- Expose the topside of the precast concrete panels by removing the concrete topping and rigid insulation to assess leakage along expansion joints, longitudinal joints, the structural steel girders and at previous concrete repairs;
- Obtain samples of the concrete topping to determine the depth of chloride contamination;
- Inspect condition of the supporting structural steel beam lateral restraint connections to the precast slabs; and
- Inspection condition of beam and bracing connections.

#### 2.2 Waterproofing Protection Systems

Should the further testing of the parking structure indicate that there is minimal risk of deterioration of the structure due to chlorides in the slab, then a more positive form of protection of the slab should be considered. A rubberized membrane covered with an asphaltic wear course could be installed above the concrete topping. The existing concrete topping should be sounded and repaired prior to applying the rubberized membrane. There is potential for future concrete deterioration of the existing concrete topping with this protection system.

Alternately, the existing concrete topping and rigid insulation could be removed. A rubberized membrane could then be applied directly to the precast slabs with proper detailing at joints. The rigid insulation could then be reinstated to maintain the thermal protection for the occupied space below. A reinforced concrete topping would then be placed over the insulation to ensure all loads on the parking deck are evenly distributed to the precast concrete panels.<sup>168</sup>

From these reports, various issues about the building, and specifically the deck and structure, were identified, including

- It could not be determined whether a waterproofing membrane had been installed.
- Water leakage was a continual maintenance issue.
- Corrosion was observed on some beams and columns.
- There may have been chloride contamination in the precast parking deck slabs.
- The true state of the deck or what the long-term costs might be could not be assessed.
- Further study was recommended, including an inspection of the condition of beam and bracing connections.

Nicholls Yallowega Bélanger provided two preliminary cost estimates to repair the roof deck. They were dependent on the outcome of the further studies that had been recommended:

- Option A involved the installation of a new waterproofing membrane over the existing concrete topping. It would be covered with a protection board and an asphaltic wear layer. The cost was \$606,500.
- Option B involved removing the existing concrete topping and insulation, applying a new waterproofing membrane which would be covered with protection board and reinforced concrete topping. It would cost \$1.8 million.<sup>169</sup>

Mr. Nicholls testified that leaking water with chlorides can be a problem for a building. Left uncorrected, he said, it can lead to the loss of structural integrity for a building.<sup>170</sup>

The City was never provided with the Nicholls Yallowega Bélanger or the Halsall reports.<sup>171</sup> Mr. Kennealy never sought permission from Mr. Leistner to give these reports to the City,<sup>172</sup> nor did Ms. Guertin.<sup>173</sup>

Roger Pigeau, the chief building official at the time, never saw the Nicholls Yallowega Bélanger report. He agreed that it raised issues concerning the structural integrity of the parking deck and whether it was watertight. Had he seen the report, he would have pursued the matter under the relevant provisions of the *Building Code* and the *Property Standards By-law*.<sup>174</sup>

## What the Retirement Living board learned of the reports

### Limited information given to board about the contents of the reports

Mr. Kennealy acknowledged that the reports indicated that there was much that the architects and the engineers did not know about the condition of the building. They needed to know more because there could be significant issues concerning its structural stability. He also agreed that the cost estimates provided would be significant capital expenditures if they in fact had to be incurred.<sup>175</sup>

The first Retirement Living board meeting after the receipt of the Nicholls Yallowega Bélanger report was held on December 3, 1998. At that meeting there was a discussion about the purchase of the Mall by Retirement Living. Mr. Kennealy testified that he took the section of the report dealing with costing with him to the meeting and prepared a hand-out for board members to look at. The board would have discussed, generally and specifically, the costs associated with the repair of the parking deck. Mr. Kennealy did not show members the part of the report dealing with the parking deck. He did say, however, that the board talked about it generally. He said he told the board that the consultants advised that they should investigate the parking deck more closely in order



to really understand its components.<sup>176</sup> The part of the report concerned with the parking deck dealt with further testing to determine the extent of any deterioration of the concrete slabs – thereby raising the spectre of a possible problem with the structural integrity of the building.

I find it is highly doubtful that Mr. Kennealy actually handed out these portions of the Nicholls Yallowega Bélanger report to the board. Ms. Guertin could not recall if he did or not. If he did, it would have been a serious violation of the non-disclosure agreement, and Ms. Guertin would not likely have forgotten it. She was certain, however, that Mr. Kennealy did share some information with the board about the costs of the remediation and the fact that there were issues that needed further exploration.<sup>177</sup> Mr. Farkouh testified that it was likely he was not presented with the numbers from the report.<sup>178</sup>

Mr. Kennealy said that Mr. Leistner never orally or in writing relieved Retirement Living of its obligations under the non-disclosure agreement. However, after receiving approval from the board on September 28, 1998, to pursue the purchase of the Mall and the Hotel, he did not feel uncomfortable about failing to honour the non-disclosure agreement by giving information to his board.<sup>179</sup>

If Mr. Kennealy felt unrestrained by the non-disclosure agreement, I question why he would reproduce only the costing from the Nicholls Yallowega Bélanger report. Why would he not have given the board members the whole report? I find it more likely that at the board meeting, the discussion was in very general terms, without specifics about the potential problems identified by Nicholls Yallowega Bélanger being mentioned or any portions of its report being handed out. The content of the report could potentially be very troublesome if it were brought to the attention of any City officials. Indeed, it could have prompted the City to require major remedial work to be done on the Mall, as Mr. Pigeau testified.

The board, at the December 3, 1998, meeting, passed a resolution directing three committees (Community Issues, Diversification, and Finance) to meet and report back in writing at the next meeting (December 22, 1998). The committees would each examine specific issues relating to the potential purchase of the Mall and the Hotel. For example, the Finance Committee was to “review the viability of the project itself, and make recommendation on a[n] offering price.”<sup>180</sup>

### **The Board is given false information that the building is structurally sound**

Obviously, Ms. Guertin did not share Mr. Kennealy’s view that the non-disclosure agreement did not have to be followed as far as the board of Retirement Living was concerned. She faxed another letter to Mr. Leistner, on December 17, 1998, to obtain his permission to share some information with the board.<sup>181</sup> This information included a copy of a brief summary of the Nicholls Yallowega Bélanger report which included this sentence: “The initial inspection indicates that the building is structurally sound, including the parking deck, and has been well maintained.”<sup>182</sup>

Mr. Leistner answered her request and required that certain deletions and protections be put in place before the information could be provided. He did not ask that any change be made to the statement that the building was structurally sound.<sup>183</sup>

In his testimony, Mr. Kennealy very reluctantly conceded that the statement about the building and the parking deck being structurally sound was false. The following exchange took place:

Q. Let’s take this one step at a time. Do you know what “structurally sound” means?

A. Yes.

Q. It means that the building is capable of supporting its own structure and any weight to which it may be subject; correct?

A. Yes.

Q. Do you agree with me that the Nicholls Yallowega report said we don't know if it is structurally sound?

A. Yes.

Q. Therefore, do you agree with me that it would be wrong to say that their report indicated that the building was structurally sound?

A. In that interpretation, yes.

Q. Is there any other interpretation which could possibly mean anything Sir?

A. I guess not.

Q. So that statement is false; correct?

A. It could be, yes.

Q. It is, isn't it?

A. Yes. Yes, it was – yes.<sup>184</sup>

Ms. Guertin acknowledged that the statement that the building was structurally sound was not true. She called it a “poor choice of words.”<sup>185</sup> She made no request to Mr. Leistner to share the information about the building's condition with the City, nor did she ask to share the Nicholls Yallowega Bélanger report with the board or the City.<sup>186</sup>

I am of the view that it would not have been reasonable for Ms. Guertin to make this request of Mr. Leistner on December 17, 1998, if these issues had already been spoken of at the board meeting of December 3, 1998. Further, it makes little sense for Ms. Guertin to have planned on telling the board that the engineers found the building and parking deck to be structurally sound if Mr. Kennealy had told them that the engineers did not know the true state of the parking deck. This evidence further supports my finding that the board was given very limited information about the condition of the building and parking deck on December 3, 1998.

## **The Retirement Living board decides to make an offer to purchase the Mall and Hotel – but reports to board committees that the building was structurally sound**

Ms. Guertin prepared a report for each of the committees<sup>187</sup> to assist the members to determine their position with respect to the acquisition of the Mall and the Hotel. Mr. Kennealy testified he assumed he had read and approved the reports before they were circulated.<sup>188</sup> The information for which Ms. Guertin sought Mr. Leistner's approval to share was incorporated into the reports for the committees. All three committees received identical information concerning the condition of the building.<sup>189</sup> Ms. Guertin wrote:

Prior to proceeding with a purchase of the property a more thorough review of the property is recommended.

The building condition assessment indicates that the building is structurally sound.<sup>190</sup>

Ms. Guertin was unable to explain how she could conclude that the Nicholls Yallowega Bélanger report said the building was structurally sound.<sup>191</sup> For his part, Mr. Kennealy tried to maintain that the statement was a true reflection of their belief at the time.<sup>192</sup>

After reading the Nicholls Yallowega Bélanger report myself, I find it difficult to accept that neither Ms. Guertin nor Mr. Kennealy recognized the inaccuracy of that statement.

The committees were provided with cost estimates for a number of different capital expenditures that, in the opinion of Nicholls Yallowega Bélanger, would be required over the next several years. However, the cost estimates given for the parking deck were not included. The reports noted that there had already been significant maintenance and repairs, probably due to the absence of a membrane. Repairs and maintenance would be required in the future unless the deck was resurfaced.<sup>193</sup> Ms. Guertin said that, although the future expenses for this maintenance were not referred to in the estimates, the board was well aware of the potential costs.<sup>194</sup>

On December 30, 1998, the board received the reports of the three committees and a discussion followed. The board authorized Mr. Kennealy to make an offer for the purchase of the Algo Centre for \$2.5 million.<sup>195</sup>

### **Retirement Living agrees to buy the Mall and the Hotel – and tells a potential lender that the building is structurally sound and that it will replace the roof deck “in the distant future”**

On January 5, 1999, Mr. Kennealy wrote to Mr. Leistner and informed him that he had been authorized to offer \$2.5 million for the Algo Centre.<sup>196</sup> This offer led to negotiations between the two men that resulted in an agreement<sup>197</sup> on February 26, 1999, to sell the Algo Centre for \$4 million.<sup>198</sup> It was being sold “as is”<sup>199</sup> with a closing date of June 10, 1999.<sup>200</sup>

**This offer led to negotiations between the two men that resulted in an agreement on February 26, 1999, to sell the Algo Centre for \$4 million. It was being sold “as is” with a closing date of June 10, 1999.**

A document titled *Business Plan for the Purchase of the Algo Centre* was prepared for the purpose of obtaining financing for the purchase.<sup>201</sup> Ms. Guertin was the author of most of it. At page 4 this plan repeated the false statement about the building being structurally sound.<sup>202</sup> Mr. Kennealy could provide no explanation for this sentence.<sup>203</sup> The same page provided a list of capital expenditures that would be required over the next several years. However, it too, like the committee reports, failed to include the estimated costs to fix the parking deck. Mr. Kennealy denied that these estimates were omitted because a decision had been made not to incur capital expenses for the parking deck.<sup>204</sup>

Ms. Guertin indicated that the estimated costs for the parking deck remediation would ultimately show up as a result of the due diligence process, which would be shared with the bank.<sup>205</sup> This explanation does not explain why this estimate was left out entirely, rather than giving the lender notice of a significant potential future expenditure, if it was in fact a cost Retirement Living anticipated incurring. It is more logical to conclude, in my view, that not mentioning the cost was consistent with a decision not to spend the money.

Ms. Guertin was the author of a memo dated April 14, 1999, to Michael Collins at the TD Bank in Sudbury. It promised to forward the Nicholls Yallowega Bélanger report to him as well as the Halsall report when it was completed. Ms. Guertin explained in the memo that Retirement Living’s approach to capital spending was, generally, only to spend capital dollars when earned – in other words, not to borrow for capital expenditures. This approach meant that

As far as the Algo Centre is concerned, I anticipate our capital funds for the next few years could be allocated as indicated below. You will notice that the NYB [Nicholls Yallowega Bélanger] report presents options for replacing the parking deck to minimize annual maintenance. We have elected to continue with a maintenance program at this time with hopes of undergoing a replacement program at some point in the distant future.<sup>206</sup>



## **Conclusion: Retirement Living had decided, when it purchased the building, that it would not expend large amounts of capital to fix the roof deck**

Ms. Guertin said that this statement represented the thinking of the Retirement Living organization at the time, but that this view was subject to the further testing Halsall was doing.<sup>207</sup> However, the statement to the TD Bank was not qualified in that fashion. Mr. Kennealy said the statement did not represent his thinking on the subject. As far as he was concerned, no decisions had been made at this point.<sup>208</sup>

Ms. Guertin was quite clear that, as a finance person, she was not authorized to make this type of decision and would not communicate this fact without proper authorization.<sup>209</sup>

I find that this memo is a clear articulation of Retirement Living's true intentions with respect to the parking deck. Retirement Living did not intend at that time to spend significant sums on capital expenses to fix the parking deck. It thought that it could simply continue with the same maintenance plan as Algocen had followed. This statement is consistent with the business plan given to the potential lenders and with what the committees had been told – and, more significantly, with how Retirement Living actually dealt with the parking deck during its ownership.

**Retirement Living did not intend at that time to spend significant sums on capital expenses to fix the parking deck. It thought that it could simply continue with the same maintenance plan as Algocen had followed.**

Retirement Living received the fair market value appraisal for the Mall and the Hotel on April 15, 1999.<sup>210</sup> It came in at \$5.8 million. The City was not billed for this report. It did, however, pay for the November 12, 1998, Nicholls Yallowega Bélanger report that it never received.<sup>211</sup>

## **May 1999 Halsall report: Past maintenance was inadequate and two options for roof repair**

On April 22, 1999,<sup>212</sup> Retirement Living received a draft of the Halsall structural condition assessment.<sup>213</sup> The final report was dated May 10, 1999.<sup>214</sup>

Halsall determined that there was no waterproofing membrane on the parking deck. Moisture penetration was resisted by the concrete topping and the precast panels and by the sealant applied to the joints in both. The final report noted:

Caulked joints and cracks in the concrete topping and precast panels are poorly detailed. They either promote three-sided adhesion within the joint or do not have a proper 1 : 2 depth : width profile. Both conditions reduce the performance of the sealant and can damage the adjacent concrete, resulting in moisture penetration.

Mr. Kennealy agreed that Halsall was saying that what had been done in the past was inadequate; the leaks had not been fixed.<sup>215</sup>

Halsall offered two options. The first option consisted in part of routing and sealing all joints and cracks in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation before the sealant was applied. The cost, inclusive of engineering fees, was \$443,000. The second option was the installation of a waterproof membrane with protective asphalt or concrete topping. This cost was \$776,000. Halsall pointed out that both options would involve ongoing maintenance requirements in the form of sealing cracks. Finally, the report indicated that, "if required," Halsall was prepared to do a phased approach for the first option "tailored to your financial constraints."<sup>216</sup>

Mr. Kennealy testified that the Halsall report alleviated his concern about the structural integrity of the building.<sup>217</sup> He drew this conclusion because the report stated:

Corrosion of the steel support beams was minor consisting of surface corrosion (removing the red oxide coating) or minor scaling (less than 1 mm). Though thicker (3–5 mm) scaling is present in some locations, this still only represents less than 1 mm of original surface loss and is a relatively insignificant portion of the overall steel cross section.

The precast panel concrete is providing sufficient protection to the embedded prestressing tendons. Precast concrete is typically of high quality, limiting chloride penetration, moisture penetration and carbonation of the concrete.<sup>218</sup>

On May 17, 1999, Ms. Guertin provided a binder to the Finance Committee containing due diligence documentation, which included both the Nicholls Yallowega Bélanger report of 1998 and the Halsall report of 1999. At the meeting of the Finance Committee on May 20, 1999, Retirement Living waived the financing condition of the agreement of purchase and sale.<sup>219</sup> The two reports were discussed at the meeting. Mr. Speck was present at the meeting as a board member appointed by City Council and put forward the motion to waive the financing condition.<sup>220</sup> He testified, however, that he did not recall ever being on the Retirement Living board or ever seeing the two reports.<sup>221</sup> He agreed that if the Halsall report had been brought to him as a councillor, he would have brought it to the attention of the chief building official.<sup>222</sup>

**This evidence is a clear example of the inevitable conflict in which councillors serving as Retirement Living directors were placed. The City appeared either to have been blind to this conflict or wilfully acquiesced to it.**

This evidence is a clear example of the inevitable conflict in which councillors serving as Retirement Living directors were placed. The City appeared either to have been blind to this conflict or wilfully acquiesced to it.

## June 18, 1999: Retirement Living purchases the Mall for \$4 million

The Retirement Living Board of Directors met on June 3, 1999.<sup>223</sup> The necessary resolutions were passed to assign the Agreement of Purchase and Sale to a new for-profit corporation created by Retirement Living, 1309900 Ontario Limited, so it could take title.

The deal closed on June 18, 1999. The property was transferred from Algoma Central Properties to 1309900 Ontario Ltd. [NorDev]. The \$4 million purchase price valued the real estate at \$3.75 million and the chattels at \$250,000.<sup>224</sup>

The parking deck was now Retirement Living's responsibility.

## Maintenance during the Retirement Living Years

### The 1999 Halsall report's observations – warnings about leaks but no mention of connections

In this section of the Report, I examine issues related to the condition and maintenance of the Mall from the time that Retirement Living acquired it until Bob Nazarian actively sought to acquire it in February 2005. I have earlier concluded that the building would likely have survived if Retirement Living had installed a membrane and wearing course when it purchased the building.

When Retirement Living took possession of the Mall as its new owner in June 1999, it did so armed with a fresh engineering report from Halsall. The second Halsall report, dated May 10, 1999, was the more detailed assessment of the rooftop parking deck that had been recommended in the 1998 Nicholls Yallowega Bélanger report. Although I described it earlier, the 1999 Halsall report and Retirement Living's interpretation of it formed the basis of much of Retirement Living's maintenance practices. Accordingly, I begin this analysis with a more detailed examination of the 1999 Halsall report.

Michael Buckley, a professional engineer employed by Halsall, was the project manager for the 1999 report. In that role he had supervisory oversight over the inspection done by Halsall of the rooftop parking deck and over the report that was ultimately issued, including its recommendations.<sup>225</sup> Jeff Truman, a professional engineer who obtained his professional engineering designation in 1998, was employed by Halsall until June 1999. Mr. Truman inspected the Mall in April 1999 and was the author of the 1999 Halsall report.<sup>226</sup>

The objectives of the Halsall report, as set out in its executive summary, were to

- identify existing conditions requiring repair;
- identify defects that could affect the durability of the structure;
- establish a basis for making recommendations for the treatment of such deficiencies; and
- develop a repair and maintenance strategy that would minimize current and future repair costs.<sup>227</sup>

The report noted the following forms of deterioration observed at the Mall:

- leakage through cracks and construction joints;
- corrosion of steel beams and suspended ceiling hangers; and
- debonded or freeze–thaw damaged concrete topping along the joints.<sup>228</sup>

Following its inspection of the Mall, Halsall concluded that a waterproofing membrane had not been applied to the parking deck.<sup>229</sup>

With respect to water infiltration that was occurring in the Mall, the report noted:

Moisture that penetrates failed sealants cannot drain, resulting in debonded topping along the joints and freeze–thaw deterioration of the topping concrete at the bottom of the joint. The presence of water at the topping / panel interface may have also contributed to the precast panel deterioration observed at some of the test areas. Though the topping is required to provide adequate load-carrying capacity of the panels, the extent of damaged or debonded topping will not adversely impact the structural performance.

Leakage to the interior typically follows a direct path through the topping joint then through the precast panel joint below. Once through the precast panels, it may run along the steel support beams or become trapped by the batt insulation on the underside of the precast panels. Wet insulation decreases the thermal performance of the roof.



...

Though most leaks are detected by staining on the ceiling tiles or because of direct leakage, many others likely remained undetected.<sup>230</sup>

Halsall made the following observation with respect to the impact of the water infiltration on the building:

Corrosion of the steel support beams is minor, consisting of surface corrosion (removing the red oxide coating) or minor scaling (less than 1 mm). Though thicker (3–5 mm) scaling is present in some locations, this still only represents less than 1 mm of original surface loss and is a relatively insignificant portion of the overall steel cross section.

The precast panel concrete is providing sufficient protection to the embedded prestressing tendons. Precast concrete is typically of high quality, limiting chloride penetration, moisture penetration and carbonation of the concrete.<sup>231</sup>

It should be noted here that, as described earlier, the 1998 Nicholls Yellowega Bélanger Report had recommended that Retirement Living obtain a second Halsall report to carry out, among other things, an inspection of beams and bracing connections. Mr. Buckley confirmed, by letter dated March 9, 1999, that the scope of Halsall's work would include a review of the "condition of beam and bracing connections."<sup>232</sup> There is no reference to the connections, however, in the 1999 Halsall report.

Mr. Truman testified that his review of the structure generally included inspecting beams and connections.<sup>233</sup> He explained that the report did not specifically comment on the condition of the connections because he observed no defects or issues with them.<sup>234</sup>

I have no reason to doubt Mr. Truman's testimony that his inspection of the Mall included a review of at least some connections. Nevertheless, a reader of the 1999 Halsall report would not know whether connections had been inspected and would therefore not be in a position to learn the condition of any such connections. Given that one of the primary purposes of the second Halsall inspection was to review the condition of the beam and bracing connections in the Mall, the 1999 Halsall report should have clearly identified the connections that were inspected and those that were not, as well as their condition.

## **Halsall recommends two options – rout and seal all cracks or install a membrane**

In its report, Halsall recommended two options. The first option (option 1) outlined the following course of action:

- rout and seal all joints and cracks in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation before the sealant was applied;
- remove sealant from the underside of the joints in the walkways;
- clean and paint all exterior structural steel, particularly the beams along the walkways;
- reinstate spray-applied fireproofing to the structural steel;
- replace corroded suspended ceiling hangers (as part of the regular maintenance); and
- reinstate all batt insulation at the underside of the parking deck.

Halsall estimated that option 1 would cost \$433,000. Part of this cost would include \$30,000.00 for what Halsall described in its report as "engineering design and project management."<sup>235</sup> Halsall further stated, "If required, we could prepare a phased repair approach for option 1, tailored to your financial constraints."<sup>236</sup>

Halsall described a second option (option 2) as follows:

An alternative to sealing joints in the topping would be to provide a waterproofing membrane, as noted in our initial report, further referred to as Option 2. A membrane will require a protective concrete or asphalt topping, increasing the dead load on the structure. Diligent snow removal or strengthening of the deck would therefore be required to accommodate the increased load. The latter options would involve significant disruption and cost. Maintenance will be required to rout and seal cracks in the asphalt as they appear.<sup>237</sup>

Halsall estimated the cost of option 2 as \$776,000.

Ultimately, the Halsall report concluded its recommendations with the following statement: “Either method introduces maintenance requirements in the form of crack sealing. Though the membrane can be expected to provide at least twice the life of the sealants, the savings in initial cost of Option 1 over Option 2 may make it more attractive.”<sup>238</sup> Further, the covering letter under which Halsall enclosed its report stated:

Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure. While waterproofing the parking deck is feasible, we suggest a program of joint re-sealing be effected instead, with consideration given to proper joint detailing. This approach, in our opinion, is the most cost-effective particularly where financial constraints exist.<sup>239</sup>

## Halsall should have more clearly described the scope of option 1

As I will discuss in greater detail below, there were divergent views in respect of what Halsall conveyed in its option 1. Mr. Buckley and Mr. Truman more fully described option 1 in their testimony and stated that the scope of work they intended to convey in the report included a requirement that the rout and seal option needed to be implemented with the involvement of qualified engineers and contractors. I heard evidence from Retirement Living, however, that it did not interpret option 1 as requiring anything more than the involvement of Mall maintenance staff. In this regard, it is important to assess the clarity of the Halsall report.

In his evidence, Mr. Buckley referred to option 1 as being a “full-scale repair” to the roof and further elaborated on the scope of work that he considered necessary to effectively implement option 1:

- A. It’s about ... doing a full-scale repair to the roof and then ongoing maintenance, yes.
- Q. So describe for me this full-scale repair to the roof.
- A. You would ... take out the existing joint seals, you would re-apply the joint seals following the appropriate specifications ... both for the installation of the material as well as ... the profiles. This would be done by a contractor who would have experience, who would have employees who would have experience, who would be monitoring the quality of the installation ... he would also have to provide a warranty for the work that he has done which would be backed up by performance bonds. It would involve taking out any routing and sealing with again the proper profiles and bond breakers, any further cracks that have developed that hadn’t been previously repaired properly. In fact, the intent of this was to do the entire deck.
- Q. So every single bit of sealant would be taken out?
- A. Yes.<sup>240</sup>

The scope of work required to implement option 1 as described in Halsall’s 1999 report does not contain that level of detail. The report does not state that the people doing the work should have a level of experience or that there should be a warranty for the work that is performed.

Mr. Buckley testified that a contractor implementing option 1 would need engineering specifications including the following:

In general, you would have to have the appropriate temperatures, the appropriate moisture contents of the slab, the appropriate materials, the appropriate joint profiles, the appropriate traffic control program so that you're not opening the deck up to use too soon after the installation. The installation has to consider how [sic] the depth of installation so that it's not subject to abuse from snowplows. That's [a] fairly broad statement of the requirements.<sup>241</sup>

This level of detail was well above and beyond what had been provided in the report. There was no reference there to such variables as appropriate temperatures or moisture content of the slabs.

In addition, Mr. Buckley testified that the work should be done by a contractor pre-qualified by Halsall.<sup>242</sup> Both Mr. Truman and Mr. Buckley testified that the regular Mall maintenance staff would not be adequately qualified to do the work – particularly where there were indications that the rout and seal work had not been done properly by them in the past.<sup>243</sup> Indeed, given the state of the deck as observed by Mr. Truman, it was clear that the Mall maintenance staff did not have the expertise and knowledge to properly repair the roof.<sup>244</sup> Mr. Nicholls of Nicholls Yallowega Bélanger testified that his understanding of the routing and sealing option presented in the report was that it could only be done by a professionally qualified contractor who was overseen by a qualified inspector.<sup>245</sup>

Mr. Nicholls was of the view that the detail contained in the report for this repair option was not sufficient to allow someone, whether maintenance or contractor, to complete the work. He further testified that the description contained in the report was a high-level description of the repair option. It did not contain the amount of information necessary to be able to undertake the work.<sup>246</sup>

Although all the professionals appeared to agree that option 1 needed to be carried out by engineers and qualified contractors, this point was never directly or adequately conveyed to Retirement Living. In its absence, Retirement Living thought it could implement option 1 with the regular Mall maintenance staff.

It is clear that the report does not make the statement that the Mall maintenance personnel were *not* qualified to implement option 1. In addition, the report seems to refer to the involvement of engineers and/or qualified contractors in an indirect, almost incidental manner. The authors of the report placed greater emphasis on the necessity for option 1 to be implemented by specifically qualified personnel in their testimony than they did in the report itself.

The 1999 Halsall report should have been clearer about the scope of work that option 1 required. Halsall should also have been explicit that option 1 required properly and specifically trained personnel to implement this work. The importance of this deficiency in the Halsall report becomes more evident when I examine the manner in which Retirement Living interpreted the report.

## **Halsall should have recommended a membrane**

The 1998 Halsall report, attached as an appendix to the Nicholls Yallowega Bélanger report, recommended two options for the rooftop parking deck, both of which entailed the application of a waterproof membrane. In contrast, the 1999 Halsall report included an option, option 1, which did not include the installation of a membrane. Mr. Buckley agreed that option 1 was recommended over option 2, although he could not recall the reason why. He characterized option 1 as a viable option at a lower price.<sup>247</sup> Mr. Truman, in contrast, testified that the 1999 Halsall report recommended both options.



The language used in the 1999 Halsall report could be seen as discouraging Retirement Living from implementing option 2. The report states that “[t]hough the membrane can be expected to provide at least twice the life of the sealants, the savings in initial cost of Option 1 over Option 2 may make it more attractive.”<sup>248</sup> As noted, in its letter enclosing the report, Halsall states that “[w]hile waterproofing the parking deck is feasible,” it “suggest[s]” the routing and sealing as the “cost-effective” approach.<sup>249</sup> I find that this wording clearly indicates that Halsall placed undue emphasis on its option 1. It characterized option 2 as less attractive and more costly.

The 1999 Halsall report actively downplayed the desirability of proceeding with the more comprehensive option of installing a waterproof membrane over the rooftop parking deck. In setting out the costs of option 2, the report included a glaring caveat that the costs of implementing it could run much higher than estimated. The first and only note to the report’s summary of costs for option 2 warned that “[t]opping removal or slab strengthening may also be employed, but at significant cost and disruption.”<sup>250</sup> As a result, option 1 was presented as having a fixed cost that is little more than half the cost of option 2, while option 2 was presented as involving potential contingencies that would significantly increase its costs.

Mr. Truman told the Commission he suspected that option 1 was recommended over the application of a membrane so that the work could practicably be done within the client’s budget.<sup>251</sup> However, as I will note below, Retirement Living (and its subsidiary NorDev) enjoyed a strong financial position throughout the period that it owned the Mall.

It is regrettable that the application of a membrane was not more strongly encouraged. If money was no object, it is clear that the application of a membrane was a better option to attenuate the leaks.<sup>252</sup> The manner in which the repair options were presented in the report led reasonable readers to conclude that they could get the same result by proceeding with option 1 as with option 2 – but for about half the money. However, the options were not equal. The report should have been much more explicit about the difference in the effectiveness of the two options. In this regard, I view the 1999 Halsall report as, at the very least, a missed opportunity.

The 1999 Halsall report should not have recommended that Retirement Living proceed with an option of routing and sealing all joints and cracks in the parking deck. This recommendation was essentially a repetitive variation of the practice that had been employed by the previous owner. I note that Dr. Hassan Saffarini and Christopher Hughes of NORR Limited were both of the view that the rout and seal option would not be effective in making the parking deck waterproof.<sup>253</sup> Halsall should have recommended the installation of a membrane over the entire deck.

## **Halsall did not adequately warn about risks of structural deterioration**

The Halsall report included observations of some water damage. Specifically, it noted some corrosion of steel beams, but observed that severe scaling had generally not occurred. However, it did not go the further step to advise of the potential outcome of continued and unabated water penetration, such as increase in corrosion, severe scaling, and the potential of section loss. Mr. Truman testified that he did not think it was necessary to do so because the effect of water and salt penetration should be “fairly obvious” to a building owner in Northern Ontario.<sup>254</sup>

In addition, the covering letter that enclosed the Halsall report stated: “Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure.”<sup>255</sup> Mr. Truman agreed that this statement conveys the message that the building continues to be in fine condition despite its exposure to water leaks.<sup>256</sup> It does not state what will or could occur if the water leaks are not stopped.

Mr. Buckley testified that Halsall was aware there were problems with leaks from the rooftop parking deck when its second report was prepared. He also knew that the maintenance crew at the Mall had been using a form of rout and seal repairs on the roof to address the leaks. There were indications that the rout and seal work that was being done on the roof was not being done properly.<sup>257</sup>

Mr. Truman acknowledged that the report did not recommend any ongoing inspection of the steel in the Mall until the repairs were made. He characterized his report as being a “high level report” intended to provide a prospective purchaser with “an expectation of what their financial commitments are going to be over the five to ten year near-term future.”<sup>258</sup>

Mr. Truman and Mr. Buckley testified that, in their view, the Halsall report provided a warning that the owner of the building must address the leaks because it gave only repair options. It did not contemplate an “as is” option.<sup>259</sup> I can appreciate the seeming obviousness that a leaking roof that allows penetration of water and chlorides into a structure is something that needs to be fixed. However, this warning by omission in the Halsall report was unfortunately too oblique. It did not adequately convey the severity of the consequences should the owner fail to properly fix the roof.

I agree with the testimony of Dr. Saffarini, who indicated that, while a proper waterproofing system in 1999 could have allowed the building to survive for its design life, there was enough information for alarm bells to ring, requiring that the risks of continued deterioration be brought to the owner’s attention.<sup>260</sup>

In my view, Halsall did not adequately provide a cautionary warning that future corrosion could lead to a critical condition.

## **Retirement Living’s maintenance program was not what Halsall recommended but a continuation of existing practice**

Of the two options recommended by Halsall, it is clear that Retirement Living purported to proceed with the first. I will next consider whether Retirement Living actually did what was recommended.

Mr. Quinn testified that in talks with Mr. Kennealy and Ms. Guertin, they would have considered the pros and cons of the options listed in the Halsall report. Although he could not recall the specifics of the conversation, he indicated that they discussed how both options would require ongoing maintenance.<sup>261</sup>

I note that in both places where Halsall particularized the costs of option 1, it included reference to costs associated with engineering services.

Notwithstanding that option 1 contemplated the involvement of professional engineering services in its implementation, Retirement Living did not in fact employ the services of an engineer. Mr. Quinn testified that in his view an engineer was not required to implement the repair and maintenance of the parking deck as set out in option 1.<sup>262</sup> Rather, he interpreted Halsall’s references to engineers and contractors as, in effect, a sales pitch by Halsall for follow-up work.<sup>263</sup>

Retirement Living appeared overly confident that it could handle the maintenance of the rooftop parking deck without the advice of an engineer. Mr. Quinn testified that, in his view, the elements of option 1 were well within his own capabilities and those of his team.<sup>264</sup> Together they were qualified to address the roof maintenance, without having to rely on an engineer, because of their relative experience. Mr. Quinn testified: “I pre-qualified Ken Snow [Mall maintenance supervisor] and his crew because there was nobody in Ontario that is more experienced in grouting and sealing that particular deck than them.”<sup>265</sup>

Despite my conclusion that the Halsall report could have been clearer that its option 1 required the participation of an engineer and qualified contractors, Retirement Living's interpretation that it could undertake option 1 on its own, with the regular Mall maintenance staff, was not reasonable.

It is baffling to me that Mr. Quinn could give Mr. Snow and his crew such a superlative endorsement. They had been unable to stop the leaks under Algocen, and they continued to be unable to do so under Retirement Living. The maintenance crew became adept at playing catch-up, but not at preventing the leaks from occurring.

Halsall stated in respect of its option 1: "If required, we could prepare a phased repair approach for Option 1, tailored to your financial constraints."<sup>266</sup> Retirement Living seemed to interpret this sentence as meaning that Retirement Living could itself phase in grouting and sealing work over time. As Mr. Kennealy explained when questioned by Commission counsel:

Q. If you want to do it over time, talk to us and we'll tell you how to do it. Isn't that what they are saying?

A. I can understand your interpretation of it. That is not how I interpreted it when I was reading it.

...

That is not how I interpreted it when I read the document. I read it and it basically told me you need to do the routing and sealing. You need to get all of the joints done ... you are reading into it that, okay, you have got to do every joint today, and then you have got to get into a maintenance. I did not read it that way. I read it as you need to be doing the rout and sealing. You need to do it in a deliberate manner. And if you need to phase it in, you can phase it in.<sup>267</sup>

I find that Mr. Kennealy's interpretation is not reasonable. His position, it seems to me, is an after-the-fact attempt to equate what they did (staying the course) to what they did not do (implementing Halsall's option 1 over time). If staying the course was a viable option, Halsall would have said so. Halsall did not recommend the status quo for the obvious reason that it was not working. It is very difficult for me to accept that this astute businessman could honestly hold that belief. In any event, Retirement Living did not materially change the manner in which the rooftop parking deck was maintained.

The evidence of Mr. Snow, who worked at the Mall in maintenance on the rooftop parking deck for more than 16 years, was most revealing. His involvement extended over the ownership periods of both Algocen and Retirement Living. He testified that the techniques used to deal with the leaks did not change over all 16 years.<sup>268</sup> His evidence is made even more compelling by the fact that Retirement Living appears to have delegated the manner in which the roof was repaired entirely to him.<sup>269</sup>

By Mr. Quinn's own admission, the maintenance plan he put into place was essentially a continuation of the program that Algocen had followed. This conclusion is illustrated by this exchange between Mr. Quinn and Commission counsel:

Q. Do you agree that Retirement Living, instead of adopting the recommendation of Halsall, decided to adopt their own kind of approach and continue what Algoma had been doing? He seems to be saying here that the only thing they did not fully address, that Halsall did not fully address in their report is the "continue as is" scenario, which Mr. Beltramin [an engineer with STEM Engineering] here opines and says this is what Retirement Living is doing?

A. You'll have to explain to me what the difference is between the Halsall Report and what ACP [Algoma Central Properties] was doing before, because I don't see a lot of difference.

Q. ... I'm not here to answer a question from you, Mr. Quinn.

A. No, okay.



Q. But if that is what your understanding is –

A. But you are asking me if we continued the ACP process or did we do what Halsall asked us to do. In my view, both of them were the same.

Q. Okay. So your understanding was that Halsall had basically approved what ACP had been doing, so you continued doing that?

A. I think anybody that reads the report and knows what ACP was doing before, they are the same.<sup>270</sup>

This exchange could not more clearly illustrate that Retirement Living did not implement Halsall's option 1. Worse, it fundamentally misinterpreted the Halsall report as blessing the deficient maintenance practices that had, since the Mall was built, allowed water and chlorides to infiltrate the building. That is not a reasonable interpretation of the Halsall report. It would mean that Halsall would advise Retirement Living to spend the better part of \$500,000 so that it and the Mall's tenants could continue to endure a leaky roof. It was not reasonable for Retirement Living to think that continuation of a practice that had failed for years would suddenly start to work.

Mr. Quinn did not ask either Mr. Buckley or Mr. Truman whether his approach to maintenance was what they had recommended in their Report – in spite of the fact that Mr. Quinn acknowledged that the roof was never leak free. This failure corroborates my earlier conclusion that Retirement Living thought it could simply continue with the maintenance plan that had been in place under Algocen – and not implement Halsall's remedial options.

Mr. Truman stated that if Halsall had been told that Retirement Living intended to continue repairing the roof with the regular maintenance staff, it would have advised it not to do so. Instead Halsall would have recommended that the work be tendered out to a qualified contractor.<sup>271</sup> Mr. Truman indicated that it is common practice for clients to contact engineers if they do not understand a recommendation.

Prudence and common sense required that Retirement Living go back to Nicholls Yallowega Bélanger or Halsall for confirmation or clarification that the way they intended to address the leaks was within the meaning of what Halsall had recommended in its option 1.

## The leaks continued during the ownership of Retirement Living

From the moment Retirement Living became the owner of the Mall in June 1999, it noticed that there was leaking from the roof.<sup>272</sup> Beginning as early as September that year, Retirement Living had to take steps to address the effects of the leaking, such as changing water-stained ceiling tiles in the Library.<sup>273</sup>

Mr. Quinn testified that, by September 1999, he would have expected that all the leaks had been stopped. He acknowledged, however, that the leaks returned during Retirement Living's ownership of the Mall.<sup>274</sup> The cycle of leaks seemed to be the same. They would become more pronounced in the spring thaw. Water would enter the building, and tenants would complain to the Mall maintenance. In the spring, Retirement Living would address leaks in much the same fashion as Algocen had done: attempt to stop the leaks as they occurred. Mr. Quinn testified that, by summer, most of the common sources of leaks that year would have been identified, and the summer maintenance program of routing and sealing the problematic leak areas would start again.<sup>275</sup>

Over time, Mr. Quinn testified, Retirement Living generally got better at addressing the leaks in the Mall. When Retirement Living sold the Mall, he said, the leaks were minimal.<sup>276</sup> I heard ample evidence, however, that the leaks continued.

The chief librarian, Barbara Fazekas, testified that the leaking that had become chronic in the Library did not improve after 1999. She said that the problem regarding leaks in the Mall generally showed no improvement after Retirement Living acquired the Mall.

The problem areas continued to be the same. During the Retirement Living ownership of the Mall, these areas included the Library, Scotiabank, and Zellers. Other areas that continued to suffer from leaking included the area around the food court, around the escalators, and around the premises that were eventually occupied by Dollarama.<sup>277</sup>

Barbara Cloughley worked at the Mall as an employee of NorDev from 1999 to 2002.<sup>278</sup> She testified that Retirement Living kept the Mall clean and made improvements such as replacing furniture. The leaks, however, continued. Ms. Cloughley noticed that the leaks seemed to be “worse around that [lottery] kiosk area there. There would be buckets if it was raining.”<sup>279</sup>

The leaks in the Library were particularly bad. They were so bad, in fact, that in 2000 Retirement Living looked at the possibility of moving the Library to a different location.<sup>280</sup>

By letter dated November 22, 2002, Ms. Fazekas complained, in dramatic and prescient language, to Mr. Kennealy about the “deplorable condition” of the Library premises as a result of the leaks, and the dangers that the leaking created:

The Library Board has asked me to write another letter of complaint regarding the deplorable condition of the ceiling over the Library space.

Considerable money and effort were expended to paint our premises in September. However, our site can never look attractive given the state of the ceiling and concomitantly, the look of the library with plastic covering over the bookshelves, drip buckets in the aisles to protect the rug and gaps in the ceiling where tiles have become so water laden that they have fallen on the floor. Fortunately, no patron or staff member has been hit by one of these yet!

You may not be aware that many of your potential clients often come to the Library while waiting for Retirement Living tours, or before or after visiting your office. Is this the impression of your values as a landlord that you want these people to have?

As I sit at my computer to write this letter, I am listening to the drips in the ceiling, wondering when the ceiling tile will fall on my head.<sup>281</sup>

Ms. Fazekas did not recall getting a response to this letter from Retirement Living.<sup>282</sup>

Despite acknowledging that he received the letter, Mr. Kennealy said under examination by Commission counsel that the correspondence did not change his perception about the state of the leaks from the rooftop parking deck; he did not consult with a professional to see if a different course should be pursued; and Retirement Living stayed the course even though at least some of the Mall’s tenants were not satisfied with the situation:

Q. Okay. Sir, you were in the residential housing rental market, right?

A. Yes.

Q. That is the mainstay of your business?

A. Yes.

Q. You have been doing that for now nigh on 20 years?

A. Yes.

Q. And you have done very, very well in that business; correct?

A. Yes.

Q. And if one of your residential tenants was telling you that they had to continually put tarp over their furniture and buckets in the house because it continually leaked, would you not, sir, fix it?

A. We would do everything in our power to fix it.

Q. And if it continued to leak when you were simply trying – when you were attempting to merely patch the leaks, would you not go to a professional and ask for advice on how to change what you had been doing so that tarps were no longer and buckets were no longer required?

A. We thought we were doing quite well, Mr. Doody. I understand you –

Q. No, but listen, sir, with respect[,] the question was –

A. Yes.

Q. – would you not, if you had a similar situation with one of your residential housing units where the tenant was making similar complaints that over a number of years they had had to have tarps and buckets, would you not seek advice as to how to change what you had been doing to try and stop the leaks?

A. If I was unable to satisfy the customer, I would try and do whatever I could to satisfy them.

Q. And you never satisfied Ms. Fazekas, did you?

A. It would appear not.

Q. Did you seek advice from a professional as to how to do something different than what you had been doing?

A. At that point, no, we did not.

Q. Did you ever?

A. I'm trying to think if we ever. I believe we just continued to work very hard at doing what we were doing.<sup>283</sup>

In March 2003 the tenants from the store A Buck or Two, located close to the food court, complained of "significant leaks throughout our store."<sup>284</sup> Mr. Quinn agreed that this description accurately reflected the condition of the store at that time.<sup>285</sup> Subsequently, the head office of A Buck or Two wrote to Mr. Quinn to formally request structural repairs to the roof: it had, he said, caused damage by water infiltration to the store premises. The letter read:

As per the lease, it is the Landlords responsibility for structural repairs to the roof, due to the fact that there is a parking lot situated above the leased premises. With respect to our insurance policy, the Landlord is responsible for any damages that occur within the premises, which are a direct result of structural damage to the building.

Please take this letter as our formal request for you to remedy this situation immediately, and we look forward to your anticipated co-operation.<sup>286</sup>

Mr. Quinn testified that he did not believe he responded to this correspondence.<sup>287</sup>

In June 2003, A Buck or Two pressed the issue of the Retirement Living's inaction to attenuate the leaking from the roof. The director of Legal Services for A Buck or Two wrote to Mr. Quinn:

We have been advising you about this ongoing problem regarding the roof leaks for several years now, both verbally and in writing. Now, not only has your lack of action had an impact on the sales of the store (as customers don't like water dripping on their heads while they shop), this has also destroyed inventory in the store, as well as the ceiling tiles and now the electrical system. Moreover, further complications will arise if a customer slips and falls as a result of the water on the floor from the leaking roof.



The situation has become intolerable. The Landlord's lack of action is bordering on gross negligence. Should this situation not be resolved by July 7, 2003, we will pursue all of our legal remedies available at law.<sup>288</sup>

Mr. Quinn did not recall what actions, if any, Retirement Living undertook in response to this letter.<sup>289</sup>

Rachelle Lalande, a long-time resident of Elliot Lake who worked at the SAAN store in the early 1990s and from 2002 to 2006, observed extensive leaking, electrical issues, and falling tiles in the store. She described putting plastic tarps over the cash registers at the end of each shift and said the employees sometimes referred to the Mall as "Algo Falls." She said that, one weekend, employees needed umbrellas over their heads while they worked.<sup>290</sup>

Retirement Living also received complaints from Scotiabank. By letter dated February 4, 2005, Robert Jurmalietis, the branch manager, complained of the ongoing water leaks:

Further to our conversation in the branch last week, would you kindly have your maint folk drop into the branch to replace the water damaged ceiling tile in my office, as well as in the Personal Bankers office area.

In addition, we have developed a substantial leak in the ABM area, so a tile or 2 will have to be replaced there as well.<sup>291</sup>

The following week, a water-saturated ceiling tile fell in Scotiabank. Mr. Jurmalietis again wrote to Mr. Quinn:

You may recall that a few days ago a ceiling tile collapsed in the Bank, from the weight of water stemming from a leak in our roof. This damaged tile remains in place, and creates an unsightly and unprofessional image for us.

Would you kindly have your maint people attend the branch and replace the destroyed tile, as well as have them replace the numerous water damaged tiles previously reported to you.<sup>292</sup>

The leaks in the Mall did not stop while Retirement Living owned it.<sup>293</sup> Mr. Kennealy testified that Retirement Living dealt with leaks promptly and quickly, which he said was reflected in the fact that he did not receive many complaints from tenants.<sup>294</sup> Although Retirement Living may well have been a diligent landlord in responding to leaks, there is no doubt that water infiltration into the Mall continued to be problematic throughout its ownership.

## Retirement Living does not second-guess its maintenance regime

Mr. Kennealy testified that he thought Retirement Living did "very, very well" in keeping water from leaking into the Mall during the time it owned the Mall.<sup>295</sup>

Mr. Quinn recalled that Retirement Living had confidence in its own ability to attenuate the leaks: "[W]e were being optimists that we thought ... given a really good valiant effort ... we could do this. We could stop the water."<sup>296</sup>

Mr. Kennealy sensed that Retirement Living did a good job in managing and responding to what its customers asked it to do.<sup>297</sup>

Unfortunately, despite Retirement Living's assertions, the leaks continued. Reality belies its principals' rose-coloured retrospection. This emperor had no clothes!

**Unfortunately, despite Retirement Living's assertions, the leaks continued. Reality belies its principals' rose-coloured retrospection. This emperor had no clothes!**

Equally regrettable, Retirement Living chose not to revisit its course of action or re-examine the problem.

Richard Hamilton, who was a director of Retirement Living from 2003 until 2009 (for three years of which he was mayor), acknowledged under questioning by Commission counsel that Retirement Living did not reconsider its maintenance strategy despite the persistence of leaks:

Q. But it continued to leak, sir, right?

A. Yes.

Q. So they weren't fixing them, right?

A. No, I wouldn't agree. They were fixing them. They weren't stopping them all. One would pop up here and one would pop up there, yes.

Q. Right, so they would fix one and one or two more would pop up, as you said?

A. Uhm-hmm.

Q. And yet you never said to them, why don't you do more to make it actually stop leaking, instead of getting worse?

A. No.

Q. If this was your house, sir, and it continued to leak over a period of 20, 25 years, and the leaks were getting worse, would you continue to treat it the way you had been treating it or would you do something different?

A. I would likely do something different.

Q. Can you tell us why you didn't ask Retirement Living as a member of the Board why they weren't doing something different?

A. No.

Q. But there was no discussion, to your recollection, about that topic of doing something different?

A. That's correct.<sup>298</sup>

Despite clear evidence to the contrary, Mr. Quinn testified that he believed the leaks were improving and that Retirement Living was, in fact, "winning the battle" against the leaks.<sup>299</sup> Even if Retirement Living was winning some battles against the leaks, those victories were hollow and short-lived. Retirement Living clearly worked hard with diligent patchwork to stay on top of leaks that occurred. But it never addressed the underlying cause of the problem. As a result, the water and chlorides continued to penetrate the edifice and corrode its structural steel.

## Bruce Caughill provides advice to Retirement Living about the Mall

### Extensive work for Retirement Living between 1999 and 2002

Bruce Caughill is a Sault Ste. Marie-based architect and engineer. His practice is approximately 90 percent related to architecture and 10 percent to engineering. He testified that he considers himself to be a civil engineer. He does not do any mechanical or electrical engineering work but does do some structural engineering.<sup>300</sup> He is the brother of Algocen's Rod Caughill.<sup>301</sup>

During the time that Algocen owned the Mall, Mr. Caughill did work (not related to the rooftop parking deck) on three occasions at the Mall.<sup>302</sup> He testified that he was "generally" aware of Algocen's issues with the rooftop parking deck but denied knowing the extent of the leaks when Algocen owned the Mall.<sup>303</sup> He stated further that he and his brother never discussed the leaks at the Mall.<sup>304</sup> During the time that it owned the Mall, Retirement Living often consulted Mr. Caughill when it had a question about architectural or engineering needs. Mr. Caughill dealt exclusively with Mr. Quinn.<sup>305</sup>

Mr. Caughill was familiar with the Mall and its rooftop parking deck because Mr. Quinn would consult him regularly on matters related to it. For example:

- In April and May 2000 Mr. Caughill provided advice in connection with the installation of a new cooling tower at the Mall. Specifically, he provided advice about the structural implications and the relative load capacity of the roof.<sup>306</sup>
- In 1999–2000, Mr. Caughill provided services to Retirement Living in connection with the renovation of premises for the Algoma District Services Administration Board (ADSAB).<sup>307</sup>
- Mr. Caughill testified that he received the 1998 Nicholls Yallowega Bélanger report and the 1999 Halsall report in connection with his work to renovate the ADSAB premises.<sup>308</sup>
- In January 2001, Mr. Quinn contacted Mr. Caughill about snow removal practices on the rooftop parking deck. In the notes he made from his conversation with Mr. Quinn, Mr. Caughill wrote “hairline cracks show up in sealant.” Mr. Caughill testified that Mr. Quinn advised him that the cracks in the sealant were related to the snow-removal procedures.<sup>309</sup> Ultimately, Mr. Caughill was not able to provide advice about these procedures.
- In July 2002, Retirement Living asked Mr. Caughill to investigate two visible cracks in the precast slabs which made up the exterior walkway at the upper Mall level. His report set out a solution to fix the problem and also referred to the Halsall report. He noted: “[Y]ou received opinions and advice on the concrete and steel floor and roof systems that should be reviewed and followed as part of your maintenance procedures.”<sup>310</sup> Mr. Caughill was asked if this suggestion was included in the report because he felt that Retirement Living was not following the recommendations in the Halsall report. He testified that Retirement Living was not maintaining the paint on the beams; although in his opinion they were not ready to fail or be subject to failure, they had some corrosion, which was not being addressed. Mr. Caughill testified that he felt that the corrosion on these exterior beams needed to be addressed as part of their ongoing maintenance.<sup>311</sup>

As a result of this involvement with the Mall, Mr. Caughill was familiar with the Mall and was aware that Retirement Living relied on him for structural and architectural advice.

### **2003: Mr. Caughill does not advise Retirement Living of his and another engineer’s concerns about the long-term detrimental effects of maintenance practices on structure**

Mr. Caughill testified that, in July 2003, Mr. Quinn contacted him because the Mall maintenance staff had noted an issue with the perimeter wall at the parking deck on the east side – the wall closest to Ontario Avenue. Mr. Quinn said that the wall was bowed out in the area where it met the parking deck. Mr. Caughill told the Commission that these perimeter walls were steel framed and clad with steel siding.<sup>312</sup> He explained that he did not go to the site but, rather, referred Mr. Quinn to STEM Engineering (STEM). He did very little structural work himself and felt that this issue was beyond his capabilities.<sup>313</sup> When Retirement Living retained STEM directly, Mr. Caughill provided some drawings to STEM, but nothing else.<sup>314</sup>

In his memo to Mr. Quinn recommending STEM for the job, Mr. Caughill referred to a structural audit that had been done by Trow. He wrote:

We do not have the resources and experience to take this further and I recommend hiring a structural engineer that does. It is my understanding that the previous owners had a structural audit done by Trow Consulting Engineers at one time and that Halsall and Associates did a report for NorDev (through Nichols Yallowega) when the property was purchased. I don’t know if their files would be of benefit here but I suspect this problem is so specific, they wouldn’t.<sup>315</sup>



Mr. Caughill neither had the Trow report referred to in his memo nor took steps to obtain it. He agreed that, in retrospect, it probably would have been a good idea to obtain it or to ensure that STEM had it.<sup>316</sup>

A site visit in connection with this issue took place on August 5, 2003. In attendance were Messrs. Caughill, Quinn, and Randy Beltramin of STEM.<sup>317</sup> On September 8, 2003, Mr. Beltramin sent an email to Mr. Caughill expressing clear concern about the maintenance practices of Retirement Living:

I will have a report and reinforcing detail tomorrow for the damaged panel. As discussed earlier[,] the panel is not in a precarious state at present but needs repairs to prevent water penetration and to reinstate its structural integrity.

I don't know if you read Halsall's last report, but they conducted a very detailed investigation of the parking deck. The resulting report pretty much reiterates what the first one recommended but with more detail. *The only thing they did not fully address was the "continue as is" scenario, which NorDev is doing. As you and I discussed[,] this can have long term detrimental results as the structure slowly deteriorates. Some of the structural repairs that you have already done and other visible areas of concern (precast cracks) will be an ongoing issue. Hopefully the areas of concern can be found and repaired before a failure occurs.* The job of chasing down and resealing cracks is also becoming a larger job each successive year as existing cracks are reinspected and new ones found. It appears that the eventual scenario will be that each precast panel joint (both longitudinal and lateral) will be caulked. In addition, students[,] instead of experienced personnel[,] are doing the work.<sup>318</sup> [Emphasis added].

Mr. Beltramin's email is striking for its prescient assessment of the implications of the maintenance regime being followed on the Mall.

In his email, Mr. Beltramin made note of the fact that the only thing not addressed in the Halsall report was the Retirement Living "continue as is" scenario. Mr. Caughill agreed that what Mr. Beltramin had meant in his email was that the Halsall report did not address the consequences if Retirement Living simply perpetuated Algocen's maintenance practices on the parking deck. Yet, despite the fact that Mr. Beltramin's email made reference to a discussion between himself and Mr. Caughill about the long-term detrimental effect on the deterioration of the structure from the "continue as is" scenario, Mr. Caughill testified that he did not recall having a discussion with him on these issues.<sup>319</sup>

Mr. Caughill stated that he did not forward the email to Mr. Quinn or anyone else at Retirement Living because STEM was working directly for Retirement Living. He expected that if Mr. Beltramin had those concerns, he would speak to Mr. Quinn about them. Mr. Caughill confirmed that he did not follow up with Mr. Beltramin following receipt of the email, nor did he contact Mr. Quinn about the concerns or offer to assist Retirement Living in dealing with those issues.<sup>320</sup>

Mr. Quinn testified that Mr. Beltramin did not express those concerns to him, nor did he recall Mr. Caughill ever talking to him about them.<sup>321</sup>

Mr. Beltramin's email of September 8, 2003, is a clearly worded and accurate description of the deficiencies of Retirement Living's maintenance practices and the long-term implications of continuing them. In my view, on receipt of Mr. Beltramin's email, Mr. Caughill should have immediately provided it to the principals of Retirement Living – particularly as Mr. Quinn relied on him for architectural and structural advice. Unfortunately, Mr. Beltramin's clear-sighted concerns never reached Retirement Living.

## 2005: Retirement Living consults Mr. Caughill about loads on the parking deck

In January 2005, after owning the Mall for five years, Retirement Living returned to Mr. Caughill to inquire about the loading of the parking deck. In response, he advised Retirement Living to refer to the 1998 Halsall report, pointing out that it was the latest structural information at Retirement Living's disposal and should be used as the guideline for loading the parking deck.<sup>322</sup>

Specifically, Mr. Caughill wrote:

Your 1988 [clearly 1998 was intended] Building Condition Assessment, Appendix A Structural Review Report by Halsall Associates Limited, provides the basic information on parking deck loading. This is the latest structural information that you have unless you commission another study, [and] should be used as the guidelines for loading the parking deck.

...

In addition to the prospect of structural failure due to equipment and snow loads, there are vibration and deflection issues to be considered. Maintaining water-tight joints and preventing delamination of the wear and base courses of concrete will be difficult when deck sections are over-loaded but do not fail.<sup>323</sup>

Mr. Caughill testified that he did not feel at that time that Retirement Living should obtain an updated survey of the condition of the building.<sup>324</sup>

When asked if he included the warning in the final paragraph about the importance of joints being watertight because he was aware of the continued water leaks, Mr. Caughill did not answer the questions directly. Rather, he testified that he was aware that the entire roof structure was subject to ongoing maintenance with caulking and sealing. He also testified that he was not concerned about the joints being watertight at that point.<sup>325</sup>

Mr. Caughill testified that, after providing information in connection with Mr. Quinn's inquiry regarding snow removal, the only other work he performed at the Mall for Retirement Living before the sale of the Mall to its third owner was the design of a hotel lobby. He added that the work to implement his design was never carried out.<sup>326</sup>

## Ministry of Labour during the Retirement Living years

It is noteworthy that, during the time Retirement Living owned the Mall, the Ontario Ministry of Labour was not involved with issues resulting from the leaks from the roof even though one of its inspectors, Ralph Regan, had been in the Mall several times for other reasons.

Mr. Regan conducted an inspection of the SAAN store on March 29, 2001. He indicated that there were water-stained ceiling tiles in the store and issued an order that provided, in part, that "[t]he ceiling tiles and area above the tiles shall be checked for mould by a competent person."<sup>327</sup> Mr. Regan testified that this order was prompted by the fact that there had been complaints about mould in the Library.<sup>328</sup> Mr. Regan could not recall if he observed signs of leaking elsewhere in the Mall around that period.<sup>329</sup>

In May 2002, Mr. Regan conducted an inspection of the Library. Although he had previously responded to complaints about leaks there, in 1995, and the Health and Safety Committee had recommended at that time that the source of leaks be corrected, Mr. Regan testified that he did not take any steps during his 2002 visit to inquire about any continuing leaks in the Library. He did not follow up on the committee's recommendation and could not recall whether he was informed that the leaking had decreased in the Library.<sup>330</sup>

Mr. Regan's report of his November 2003 inspection of Zellers does not mention any concern expressed about leaks in the store. He testified that he saw the "odd stained [ceiling] tile," but he did not observe buckets or tarps. He said that a stained ceiling tile would not likely be a contravention of the *Occupational Health and Safety Act*.<sup>331</sup>

However, as I discuss below, Mr. Regan did investigate complaints about leaking in the Library in 2005.

## The City's Response to the Leaks

### The City could have ordered that the leaks be fixed

All the City officials who testified before the Commission had some knowledge of the leaks at the Mall throughout its history. The City had a Property Standards By-law that it could have enforced, as a means of dealing with the leaks, had it chosen to do so. Unfortunately, the City took no steps to invoke such power until after Retirement Living had sold the Algo Centre.

By-law No. 79-15 was passed by Council on January 24, 1979.<sup>332</sup> It was repealed and replaced by By-law No. 03-29333 on May 26, 2003. The structural standards and the requirement for water tightness were identical in both versions. With respect to structural soundness, they required:

Every part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected<sup>334</sup>

With regard to roofs in particular, these successive by-laws stated:

The roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings.<sup>335</sup>

Property standards are enforced by municipally appointed property standards officers.<sup>336</sup> These officers are empowered to issue orders to the owner of a property to remediate the deficiency. The owner has the ability to challenge the order, first to the municipality's Property Standards Committee and then in court. If the order is not challenged, or if the challenge has not been upheld, the owner must comply with the order. If the owner does not comply, then the municipality can perform the work and take steps to recover the costs from the owner. The main difference between the two by-laws is in its means of enforcement. The earlier by-law provided for its own enforcement. The later version was enforced through the provisions of the *Building Code Act*.<sup>337</sup>

### Progressive and complaint-driven by-law enforcement policy

As I described earlier, the City of Elliot Lake adopted a policy of *complaint-driven* by-law enforcement. Generally speaking, the City reacted to complaints about possible violations rather than proactively conducting inspections to identify contraventions. As the first step in the process, a complaint had to be received. Once a complaint was received, the City practised what it characterized as "progressive enforcement." This process was described in the clerk's report:

Most by-laws are administered using a progressive enforcement practice. The objective of progressive enforcement is to achieve compliance without laying a charge.\* It can be described as an escalating

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\* Failure to comply with Property Standards By-laws could result in a charge being laid in addition to an order being issued requiring that the deficient property be repaired. In the case of By-law 79-15, the charge would be under the by-law itself. In the case of By-law 03-29, the charge would be under the *Building Code Act*.



system that elicits a stronger response at each step until compliance is achieved. Progressive enforcement is dynamic. It changes according to the nature of the by-law, the enforcement history, the nature of the circumstances and the responses received.<sup>338</sup>

As a general matter, it seems to me that the progressive enforcement policy is a sensible approach. It is one of general application in many parts of the province. However, its effectiveness depends on actually escalating the response when warranted. In this regard, as I discuss below, the City's approach left much to be desired.

## The Library complains to City in 1998, and nothing is done

The Library's complaints to the City about the leakage from the roof have been noted earlier. These complaints persisted. In fact, by coincidence, City Council was learning of the possible purchase of the Mall by Retirement Living just as events that resulted in yet another complaint were unfolding.

The City's Joint Health and Safety Committee conducted an inspection of the Library on August 26, 1998. On November 4 that same year, the committee reviewed the inspection report and made recommendations. The following day Phil Butler, the secretary of the committee, wrote to Ms. Fazekas, the chief librarian, and outlined the recommendations – including the replacement of missing ceiling tiles.<sup>339</sup> The tiles had become water-laden from the leaks and had fallen.

Ms. Fazekas responded to Mr. Butler on December 9, 1998. She informed him that she had had discussions about the ceiling tiles with Mr. Bauthus two months previously, on October 9. Mr. Bauthus had informed her that he had met and discussed this issue earlier that day with Mr. Liautaud, the Mall manager. The matter was not resolved. She felt that Mr. Bauthus was reluctant to pressure the Mall on these issues. She further informed Mr. Butler that the Library board had passed a resolution at the November board meeting and hoped to appear before council on January 11, 1999, to request a budget increase.<sup>340</sup>

The resolution read as follows:

**Whereas** the Library is constantly subject to water damage from the leaky roof,

**Whereas** this water affects the condition of the collection, presents health and safety problems and presents an unpleasant aesthetic appearance in a public building,

**Whereas** the Library has repeatedly approached the landlord but has not received a positive response,

**Whereas** there is concern that municipal insurance coverage may be affected by lack of action

**Be** it resolved that the City Council be approached to increase the Library's operating budget sufficiently that the Library Board can address these ongoing maintenance concerns.<sup>341</sup>

Ms. Fazekas also told Mr. Butler that Merlyn Bishop, the City treasurer, had suggested that the Library board withhold rent in protest.<sup>342</sup> The board did, in fact, recommend to the City that it withhold rent. However, the City never took that action.<sup>343</sup>

In his testimony, Mr. Bauthus agreed that he had talked to Ms. Fazekas about this issue but said he had not been reluctant to press the landlord. He had spoken to Mr. Liautaud. In response, Mr. Liautaud said that Algocen was working to fix the leaks; he also said that the terms of the lease required the tenant to pay for the consequential damage from the leaks. Mr. Bauthus did not refer the issue of the leaks to Mr. Pigeau at that time. As a result, there was no follow-up by Mr. Pigeau of this apparent breach of the Property Standards By-law. Mr. Bauthus testified that he did not refer the issue to Mr. Pigeau because he could see that Algocen was trying to fix, or at least lessen, the damage caused by the leaks. It does not appear that Mr. Bauthus asked Mr. Liautaud if Algocen had received any professional advice about this ongoing problem.<sup>344</sup>

In December 1998, while the Library board was engaged in this discussion with City officials, the Board of Directors of Retirement Living was deciding whether to make an offer to purchase the Algo Centre. As part of that process, as described above, board members had been told that “the building is structurally sound.” Mayor Farkouh and Councillor Croteau were both members of the board. If the board had received accurate information about the Nicholls Yallowega Bélanger and the Halsall reports, if the Library complaints had been more widely circulated within the City, and if all parties engaged in this discussion had been more open about the appropriate way to deal with a capital asset of significance to the community, different decisions might well have been made.

On December 30, 1998, Ms. Fazekas wrote to City clerk Larry Burling and informed him of the resolution passed by the Library board on November 12, 1998. She requested that the board be permitted to appear before the mayor and council on January 11, 1999, to address these concerns. She attached a report she had prepared, to provide council with background information concerning the physical plant at the Library.<sup>345</sup>

Her report stated in part:

In 1989, the Library was moved to the Algo Centre Mall, an area of some 8500 s.f. At the time of negotiation, the Library Board was assured that the mall’s chronic problem with a leaky roof had been dealt with. From that time on, the Library has had problems with water damage, poor air quality and decrease in the aesthetic quality of the Library’s appearance. Despite considerable correspondence with the Mall Manager, the situation has not been improved to the satisfaction of the Library Board.<sup>346</sup>

Ms. Fazekas could not recall whether this report was actually considered by council on January 11, 1999.<sup>347</sup> The minutes for the meeting of council of that date indicate that a resolution was passed to receive the Library board’s November 12, 1998 Resolution No. 37/98 “concerning a request for an increase in their operating budget to deal with maintenance concerns.”<sup>348</sup> Ms. Fazekas could not recall a further response to her report, nor could she remember whether the City spoke to Mall management about fixing the leaks.<sup>349</sup>

Mr. Bauthus saw Ms. Fazekas’s report when it was submitted to Mr. Burling. Again, he did not refer it to Mr. Pigeau before its presentation to council. He was unable to explain his failure to do so.<sup>350</sup> He viewed the report as a complaint within the meaning of the by-law enforcement policy.<sup>351</sup> That would have required Mr. Pigeau at least to conduct an inspection and take what steps he saw fit<sup>352</sup> under the Property Standards By-law.<sup>353</sup>

On January 11, 1999, City Council received the resolution of the Library board. Council directed City staff to approach the landlord in an attempt to resolve the issues.<sup>354</sup> Mr. Bauthus viewed this decision as a two-part direction: the City had two roles with respect to the Mall in connection with the leaks. It had a role as a regulator (with respect to property standards) and a role as the representative of the Library (given that it was a tenant in the Mall). As the tenant’s representative, Mr. Bauthus would try to get the landlord to fix the roof. He expected Mr. Pigeau, as a regulator, to consider his options under the Property Standards By-law. However, he does not recall making the referral to Mr. Pigeau or ever asking him what he actually did.<sup>355</sup>

Mr. Pigeau testified that he was not aware that Ms. Fazekas had written to Mr. Burling on December 30, 1998. He knew nothing about the content of her letter, the fact that she wanted to appear before council, or the outcome of the meeting. Had he been aware of the letter, he says, with hindsight, that he would have interpreted it as a complaint and pursued it under the Property Standards By-law.<sup>356</sup>

Also with the benefit of hindsight, Mr. Farkouh said he now sees Ms. Fazekas’s November resolution and report as a property standards complaint. However, quite inexplicably, he testified that at the time it did not occur to him or the entire council that this complaint was a property standards issue.<sup>357</sup>

Equally baffling is the fact that Mr. Burling did not consider the letter as a property standards complaint but simply a budget issue. His curious rationale was that the report and resolution of the Library board made no reference to the by-law. In addition, he thought that Ms. Fazekas had not considered the possible consequences of her complaint: potentially, they could include the displacement of all the businesses in the Mall.<sup>358</sup> By these standards, it is difficult to conceive of any complaint concerning the Mall ever satisfying Mr. Burling.

According to Mr. Bauthus, the Library board ultimately received more funding, pursuant to its request. This increased budget would allow the Library to clear up the mess caused by the leaks.<sup>359</sup> It could only treat the symptoms, however, and not cure the problem. Despite direct and clear complaints from the Library, the City's regulatory powers lay dormant simply because City officials neglected to take any action. They failed to generate any form of enforcement response from the City. Although the City had the power under its own property standards to insist that Algocen make the parking deck watertight, it did not. The City merely gave the Library funds to pay for damage caused by the parking deck leaks and ignored the contravention of the City's by-law. The Library's complaint about Algocen's anemic efforts to stop the leaks fell on deaf or indifferent ears. Meanwhile, the situation continued, unabated.

## The City has Retirement Living to deal with about the leaks

Retirement Living became the new owner of the Algo Centre on June 18, 1999. The change in ownership of the Mall did not alter the fact that the roof continued to leak. On July 14, 1999, Ms. Fazekas sent a memo to Bonnie deBortoli, a member of the Joint Health and Safety Committee. She reported that Mr. Bauthus had not taken any action on the leaking issues that had been brought to council's attention on January 11, 1999. His only suggestion had been that the Library approach Mr. Liautaud with invoices for the repair work they had initiated. She noted that the Mall maintenance staff was once again trying to fix the chronic problems on the roof. However, she held out little hope that this effort would be any more effective than the previous ones.<sup>360</sup> Mr. Bauthus confirmed that the advice he gave to Ms. Fazekas was to wait until the mess was cleaned up and to ask Mr. Liautaud to pay for it.<sup>361</sup>

The Joint Health and Safety Committee inspected the Library premises again on July 23, 1999. As with the inspection carried out almost a year earlier, this visit again revealed issues caused by water leakage.<sup>362</sup> In an effort to have those issues dealt with, Andrea Leddy, the City's personnel manager, wrote to Retirement Living on September 29, 1999. To give some background to the new Mall owner, she included with her letter a number of documents:

- the July 23, 1999 inspection report;
- the July 14 memo from Ms. Fazekas to Bonnie deBortoli;
- the November 5, 1998, memo from Mr. Butler to Ms. Fazekas which confirmed the recommendations made after the August 1998 inspection;
- the December 9, 1998, response by Ms. Fazekas to Mr. Butler's November 5, 1998, memo which contained the Library board's resolution; and
- the December 30, 1998, letter from Ms. Fazekas to Mr. Burling attaching the Library report; this document included Ms. Fazekas's report of the chronic leaking problems dating back to 1989.<sup>363</sup>



Ms. Fazekas did not recall if Ms. Leddy got a response. She did remember, however, that at some point in the early years of Retirement Living's ownership, she and Mr. Butler spoke to Mr. Quinn to familiarize him with their concerns.<sup>364</sup> Despite these efforts, Ms. Fazekas did not believe that the leak situation improved under the ownership of Retirement Living.<sup>365</sup>

On November 22, 2002, as noted above, Ms. Fazekas, at the request of the Library board, wrote to Mr. Kennealy, complaining again about "the deplorable condition of the ceiling over the Library space." She stated in this letter:

Considerable money and effort were expended to paint our premises in September. However, our site can never look attractive given the state of the ceiling and concomitantly, the look of the library with plastic covering over the bookshelves, drip buckets in the aisle to protect the rug and gaps in the ceiling where tiles have become so water laden that they have fallen on the floor. Fortunately, no patron or staff member has been hit by one of these yet!<sup>366</sup>

Because she was acting at the request of the board, its members would be aware of the letter, but not necessarily its contents.<sup>367</sup> The City clerk and all the board members received copies of the minutes of the board meetings.<sup>368</sup>

I have no evidence to allow me to conclude that the City was actually aware of the contents of this letter. However, the City's track record makes it unrealistic to expect that, if its officials had read the contents of the letter, they would have acted differently.

## 2004: Councillor Denley's efforts to get something done about the leaks

Don Denley is a retired Metro Toronto Police officer. He moved to Elliot Lake in December 2000 and was elected as a City councillor for the term December 1, 2003, to November 30, 2006.<sup>369</sup> In the 2003 election campaign, he made an issue of the fact that the City was paying Retirement Living \$77,000 per year in rent for a leaky library.<sup>370</sup> During his time on council, the leaks at the Library were a constant issue.<sup>371</sup> As will be seen below, City officials during this period received many emails about the state of the Library from Councillor McTaggart, who sat on the Library board.

On April 8, 2004, Mr. Denley made a presentation to the Library board. Cathy McTaggart, a City councillor and member of the board who was in attendance, was quite upset about some of his remarks. She sent an email to Mr. Speck, the City's chief administrative officer, on April 15, 2004. It read:

Troy: (I apologize for the length of this e-mail.) With reference to our chat in your office this morning (after the Budget meeting), I am forwarding the Minutes of the Library Board meeting that I was referring to which I received today. Please believe me, Barbara Fazekas is being very kind with regard to the reference to Councillor Denley's remarks at the beginning of the meeting. I still maintain that Don's words were presented in an entirely different way than is written here. Barbara was exercising her "Editorial skills." He most definitely stated that the Library was very low on the list of priorities with the Council (nothing to do with funding). He also said (and I failed to mention this to you this morning, for which I apologize because it is definitely worthy of mention) that the Golf Course and the Medical Clinic for the doctors were the priorities (but he said that he wouldn't get into that). I hope that you will be able to get Barbara to speak openly with you about what Don really said. If you wish to contact any of the other Board members, here are their numbers ...

As I mentioned to you, Councillor Denley's presentation was extremely brief (he found out that Heather was on the Board and worked for Retirement Living) and he clammed up. (I was absolutely amazed.) Prior to that he had been so extremely verbal concerning the fact that he wanted the Library to re-locate and the landlord of the mall should repair the roof & the library should not have to put up with the leaks, etc., etc., (he had been to the Civic Centre to check out the space available) and then his presentation

came & Heather was sitting directly across from him & Don was at a loss for words. And then, when he began to make his remarks about Council, I held my tongue because I did not want to embarrass Don by confronting him in front of the Library Board. It was extremely awkward for me. That is why I came to see you, Troy. I need your input and that of Mayor Farkouh.

I will leave this Issue with you and hope that you will be able to provide me with some feedback and whether or not this is going to go any further (to Caucus. I am absolutely willing to speak about this at Caucus. This is not a personal Issue. It is a Council Issue which I believe needs to be addressed.) I personally feel that it is extremely important for City Council to maintain as positive an image as possible in the Public Eye and Council needs to project this image to all of the sub-committees, that is why I do not like the idea or the suggestion that the City Council has any negative vibes towards any of the committees, including the Library Board. That just simply is not true and if any misconception has been created by Councillor Denley's presentation, it must be corrected. Simple as that!

Thank you for your time this morning and for your willingness to look into this concern. Best regards, Cathy McTaggart

(Councillor)<sup>372</sup>

It would appear that Mr. Denley's remarks had struck a nerve.

Mr. Denley, when he testified, did not deny making the comment; he simply did not recall it. His evidence was that he told the Library board that the leaks were grounds for breaking the lease. He described the leaks as being the equivalent of two months per year of continuous leaks.<sup>373</sup> Mr. Denley's rationale for the comment about the Library being a low priority for council was the fact that, because its ceiling leaked so badly (and Council was well aware of the extent of the leakage), the Library had to be a low priority.<sup>374</sup> I find, based on the roughly contemporaneous and detailed email of Ms. McTaggart and her concern about those words, that he did make that statement.

The reference to "caucus" in the email was a reference to council "caucus" meetings. These monthly meetings were held, without any notice to the public, where subjects that council was required by law to discuss in public were, in fact, discussed secretly behind closed doors.<sup>375</sup> I will say more below about this practice.

A caucus meeting was held on May 3, 2004. The agenda prepared before that meeting indicates that the following item was to be discussed: "Library Board – referral from Councillor McTaggart."<sup>376</sup>

Mr. Denley described the meeting as confrontational. He was told that the Library structure and its board were sensitive issues. One of the councillors described Mr. Denley as being dangerous and said that, henceforth, he would keep an eye on him (Mr. Denley).<sup>377</sup> According to Mr. Denley, the mayor told everyone to calm down because the discussion was getting out of hand.<sup>378</sup> For his part, Mr. Denley could not understand why the leaks were not being fixed.<sup>379</sup>

Mr. Hamilton did not recall the issue of leaks at the Library ever being discussed at any caucus meetings, although he had to concede that the topic must have been discussed because it was on at least one agenda. He also testified that he did not recall Mr. Denley speaking about the leaks at the meeting.<sup>380</sup> Mayor Farkouh did not remember the issue of leaks at the Library being discussed at the May 3, 2004, caucus meeting.<sup>381</sup> Mr. Speck did not recall the meeting at all.<sup>382</sup>

I have no difficulty concluding that the Library situation and the treatment of the problem by City Council were discussed at the caucus meeting of May 3, 2004. Considering her email and the fact that Ms. McTaggart went to the trouble to put this item on the agenda, it is hardly reasonable to conclude that it was not discussed at the caucus meeting. The sad reality, however, is that whatever was actually said did not result in any remedial action on the City's part.

Mr. Denley attended one other Library board meeting after the April 8, 2004, meeting, although he did not indicate when it was. This time he proposed that the Library relocate to the Pearson Centre, a municipally owned facility. The board, however, was not receptive to that idea.<sup>383</sup> Mr. Denley never requested that the Library be included on council's agenda for public debate. He felt that, because Ms. McTaggart sat on the Library board, he did not need to bring the matter forward.<sup>384</sup> He raised the issue of the leaks at the caucus meetings twice, and he thought Ms. McTaggart also raised it two or three times.<sup>385</sup>

Up to February 2005, the City had taken no action against either of the two Mall owners to fix the leaks. The City had shown no appetite to remediate the pathetic state of the Library. The Property Standards By-law, rather than being an effective public safety tool for the City, was allowed to atrophy because of the inaction of City officials.

During the ownership of the Mall by both Algocen and Retirement Living, the City's approach to the leaks was the same. It did not insist on a fix, as it could have through the by-law process, but rather hoped that a simple timid request would solve the problem. It did not.

During Retirement Living's ownership period, the City was in a most anomalous position: It was, at the same time, the regulator, the arbiter, and the enforcer of its by-law. It was, vicariously through the Library, a tenant of the Mall and, by virtue of its board membership, its (conceptual) owner. A situation more likely to lead to conflict of interest could hardly be imagined.

## Caucus meetings – illegal regular secret meetings of council

As noted above, a caucus meeting was a meeting of Council held without notice to the public. At these meetings, Council discussed, secretly and behind closed doors, matters that the *Municipal Act* required to be discussed in public.

On April 25, 2013, as Mr. Speck was testifying, counsel for the City of Elliott Lake provided Commission counsel with agendas for 28 caucus meetings that had just been discovered by City staff. These agendas cover the period from January 6, 2004, until May 2006. All the agendas were created by Mr. Speck.<sup>386</sup>

The *Municipal Act* has, since 1994, required that all meetings of council be open to the public, subject to certain exceptions that provide for in camera meetings.\* The majority of the items for discussion on the agendas do not appear to involve subjects properly discussed in camera. Mr. Speck acknowledged this point in his testimony.<sup>387</sup>

.....

\* *Municipal Act*, RSO 1980, c 303, s 55(1), M.45 555; *Municipal Act 2001*, SO 2001, c 25, s 239. The *Municipal Act* in force up to 1994 provided in section 55(1) that "The meetings, except meetings of a committee including a committee of the whole, of every council and of every local board as defined by the *Municipal Affairs Act*, except boards or commissioners of police and school boards[,] shall be open to the public, and no person shall be excluded therefrom except for improper conduct."

In 1994, section 55(1) was amended. It came into force on December 9, 1994. It extended the requirement of public meetings to committees of council by enacting an amended definition of "meeting" to mean "any regular, special, committee or other meeting of a council or local board." Section 55(3) provided that, "except as provided in this section, all meetings shall be open to the public."

In 2002 the *Municipal Act* was overhauled, with the new Act coming into effect on January 1, 2003. The new Act maintained the open meeting requirement.

A revision of the Act came into force on January 1, 2007, which authorized the provincial ombudsman or an investigator appointed by the municipality to investigate complaints of breaches of the public meeting requirement. That amendment made no substantive change to the open meeting requirement: SO 2006, c 32, Schedule A, s 104.



Mr. Speck explained that the practice of calling caucus meetings began when he was a councillor and continued for almost the entire time he held positions with the City – a period of approximately 12 years ending in July 2006.<sup>388</sup> He testified that these caucus meetings were initiated by Mayor Farkouh,<sup>389</sup> who wanted an opportunity for council to get together to discuss what was going on in the community and to receive progress reports on current projects.<sup>390</sup> These discussions were not made public.<sup>391</sup> Moreover, no minutes were kept of these meetings.<sup>392</sup> The only records were whatever notes the chief administrative officer may have taken, if any.<sup>393</sup> The public was not given notice of any of the meetings.<sup>394</sup>

Members of council and the chief administrative officer were the regular attendees. From time to time, a department head might attend, or a delegation from the public with a specific topic they wished to discuss with council. The chief administrative officer prepared an agenda, based mainly on the suggestions of councillors.<sup>395</sup>

The caucus meetings were regularly scheduled for the first Monday of the month at 4 p.m. They were held in the committee room,<sup>396</sup> not the council chambers, which was the venue for regular council meetings. The regular council meetings took place at 7 p.m. on other Mondays of the month.<sup>397</sup> Although the public was not given notice of the meetings, there was some level of awareness of them because of the delegations that, from time to time, asked to speak to council on specific issues.<sup>398</sup>

There was a divergence of opinion on whether the caucus meetings could have been attended by the public. Mr. Denley gave evidence that the public was not allowed to attend; however, there were sometimes invited guests from the public.<sup>399</sup> On some occasions the doors to the committee room were locked during caucus meetings.<sup>400</sup> The doors to city hall were locked at either 4:30 or 5:00 p.m., as early as half an hour after the meetings started.<sup>401</sup> Syl Allard, who was the chief building official for the City from September 2002 until May 2008,<sup>402</sup> described a caucus meeting as an in camera council gathering. Mr. Speck similarly referred to a caucus meeting as being in camera in an email he wrote.<sup>403</sup> Likewise, Mr. Kennealy from Retirement Living described a caucus meeting as being like an in camera meeting.<sup>404</sup>

Mayor Farkouh, for his part, testified that, to the best of his knowledge, caucus meetings were open to the public. He never saw any members of the public at a caucus meeting, however, unless they had been invited.<sup>405</sup>

The following exchange between Mr. Speck and Commission counsel offers insight into whether caucus meetings were open to the public:

Q. And what was the purpose of discussing things in secret, Sir?

A. ... I don't recall the purpose of it being secrecy. I recall the purpose of it being sharing information ... giving updates on projects that are being worked on. Allowing members of Council to understand and ask questions about where certain things were. *The fact is that they were not open to the public,* but the purpose – there wasn't a purpose for them to be behind closed doors.<sup>406</sup> [Emphasis added].

And later:

Q. And certainly one feature of a secret – a regular secret meeting was to provide for an opportunity to discuss matters that would not be made public.

A. That would be a feature, yes.<sup>407</sup>

An email written by Lesley Sprague, the City clerk, about a November 7, 2005, meeting shows just how open caucus meetings were:

Subject: Nov 7 – Caucus Meeting

Denley and McTaggart were absent. Shannon from the Standard [a local newspaper] attended. Dan showed his 20 minute BR+E video and re-explained the purpose of the one year project.

We discussed the distribution of draft minutes. The consensus was that the minutes should still be pre-distributed to Council, with a “draft” stamp. The minutes will be distributed with the agenda package and posted after Council has formally adopted them.

Once these two items were dealt with, the Mayor wound up the meeting and welcomed Shannon once again, while escorting him out the door. We all then went to the Mayor’s office to finish off the “meeting”, except for Dan.<sup>408</sup>

Mr. Farkouh accepted that, since it was Ms. Sprague who wrote the email, these events must have taken place as she related. He concluded that this email showed that this particular meeting was not an open meeting, but that barring members of the public was not his practice.<sup>409</sup>

In my opinion, the argument made by some that caucus meetings were open to the public is a disingenuous artifice that might be described as defensively self-serving, particularly at this remove. They were a vehicle designed to meet and discuss matters away from public scrutiny. I note with interest that the City’s written submissions to me in respect of the evidence heard during the first phase of the Inquiry states that caucus meetings were not open to the public.<sup>410</sup>

Council received a legal opinion dated April 5, 2007, from the City’s solicitor, Virginia MacLean. It stated that caucus meetings were meetings of council and, therefore, that public notice had to be given about them; the meeting might be closed to the public in certain well-defined situations, but a record of the meeting had to be kept.<sup>411</sup> Following this opinion, the City’s procedural by-law was amended to include the term “caucus” within the definition of a “meeting.”<sup>412</sup> According to Mayor Hamilton and Ms. Sprague, no more caucus meetings were held after this amendment.<sup>413</sup>

The relevance of the discussions that took place at the caucus meetings is largely speculative. Because no records were kept, I am not able to determine the extent to which the leaking of the Mall generally, and at the Library specifically, was discussed. Had these discussions taken place at regular council meetings, there would have been a record and, if appropriate, a means of holding persons accountable. In the absence of a record, it is not possible to do so. Was there discussion involving the protection or promotion of special interests? We will never know. All that can be said with certainty is that the electorate was disenfranchised by the process.

Furthermore, this process was part of a disturbing pattern on the part of those charged with the stewardship of the public good in Elliot Lake. Information appears to have been confined to those who were thought to have a “need to know.” Retirement Living management did not tell its own board members everything they knew about the condition of the Mall. Retirement Living board members were told not to tell anyone about issues being considered at the board, even if they were members of City Council. Council members were told that what they learned about Retirement Living at secret meetings with its management could not be disclosed to anyone else. Public officials who had a real reason to know about the physical condition of the Mall were not told about lengthy written complaints from the Library or assessments by the Joint Health and Safety Committee. And issues that were important to public policy were discussed by members of council behind closed doors. In my view, greater sharing of information, both among the decision makers and with the public, would have led to better decision making.

# Retirement Living Should Have Invested More in the Roof

## The Mall was a major investment for Retirement Living

The purchase of the Algo Mall was a singularly significant event in the history of Retirement Living. It was the first time that Retirement Living ever acquired something other than housing and residential-related properties.<sup>414</sup> The investment in the Mall increased Retirement Living’s capital assets by almost 20 percent.<sup>415</sup> It also meant that Retirement Living, which had no debt before this acquisition, had to incur a long-term debt of \$3 million.<sup>416</sup> For the first time, Retirement Living undertook a for-profit enterprise – and in that regard it proved decidedly successful.

As noted previously, Retirement Living was incorporated as a not-for-profit company. Before Retirement Living completed its acquisition of the Mall, it created a for-profit company, 1309900 Ontario Ltd., which carried on business as NorDev,<sup>417</sup> to acquire and own the Mall.

One of the important reasons that Retirement Living created its subsidiary NorDev was to allow the company to maintain its not-for-profit status.<sup>418</sup> Retirement Living is the only shareholder of NorDev. Accordingly, NorDev’s after-tax profits would be paid as a dividend to Retirement Living.<sup>419</sup> Further demonstrating the proximity between the two companies, the composition of the Retirement Living Board of Directors has always been identical to the composition of the NorDev Board of Directors.<sup>420</sup>

## NorDev and Retirement Living were in a strong financial position while NorDev owned the Mall

During the time that it owned the Algo Mall, NorDev performed well financially. It enjoyed significant profits and generally increased its retained earnings (a company’s net profits that are not distributed to shareholders) year over year. Indeed, NorDev increased its retained earnings from \$157,214 in 1999 to \$601,024 in 2004. Throughout that period, NorDev also maintained significant current assets, which included the company’s cash and investments, accounts receivable, prepaid expenses, and tax receivables (but do not include the value of revenue-producing properties). In 2004, NorDev’s current assets amounted to \$206,922.<sup>421</sup>

Table 1.6.1 sets out in summary form the figures demonstrating NorDev’s strong financial performance from 1999 to 2004.

The purchase of the Algo Mall was a singularly significant event in the history of Retirement Living. It was the first time that Retirement Living ever acquired something other than housing and residential-related properties.



Table 1.6.1 NorDev financial performance, 1999–2004

Year	Total revenue (including Hotel)	Total revenue (from commercial rents)	Retained earnings (net income retained by the corporation)	Current assets <sup>a</sup>
1999 <sup>b</sup>	\$1,387,578	\$1,085,397	\$157,214	\$536,267
2000 <sup>c</sup>	\$2,453,036	\$1,819,443	\$322,313	\$318,628
2001 <sup>d</sup>	\$2,592,479	\$1,846,372	\$385,029	\$265,267
2002 <sup>e</sup>	\$2,555,553	\$1,789,436	\$370,771	\$282,495
2003 <sup>f</sup>	\$2,912,535	\$2,032,123	\$516,614	\$430,557
2004 <sup>g</sup>	\$2,990,943	\$2,054,908	\$601,024	\$206,922

<sup>a</sup> Current assets include cash and investments, accounts receivable, prepaid expenses, and tax receivables. They do not include the value of revenue-producing properties.

<sup>b</sup> Exhibit 678.

<sup>c</sup> Exhibit 680.

<sup>d</sup> Exhibit 682.

<sup>e</sup> Exhibit 685.

<sup>f</sup> Exhibit 686.

<sup>g</sup> Exhibit 687.

As can be seen from table 1.6.1, and as Ms. Guertin confirmed in her evidence, NorDev's revenue and retained earnings generally increased year over year.<sup>422</sup>

Generally speaking, NorDev's financial performance was not just profitable but regularly surpassed its business plan expectations and goals. For example, at a NorDev board meeting in October 2001, Mr. Kennealy reported that NorDev had achieved an operating profit of \$422,541, compared with a business plan projection of \$289,651. Mr. Kennealy noted that "these results are driven by higher than forecast revenues from the Mall and Hotel / Lodge."<sup>423</sup>

Three years later into NorDev's ownership of the Mall, at a NorDev Board of Directors meeting in December 2004, Mr. Kennealy reported that NorDev had achieved an operating profit of \$654,987, compared with a business plan projection of \$454,323 – an excess of \$200,000 from the business plan. Mr. Kennealy further advised that the \$200,000 was attributable to higher than expected revenues and better than expected control of expenses.<sup>424</sup>

NorDev's parent company, Retirement Living, similarly enjoyed a strong financial performance throughout the time that NorDev owned the Mall. Like NorDev, Retirement Living experienced a financial performance that generally improved year over year. For example, in the first year that NorDev owned the Mall, Retirement Living realized an excess of revenues over expenses (which is synonymous with profits but for the fact that it is a not-for-profit company) of \$722,733. In the year before NorDev sold the Mall, Retirement Living realized an excess of revenues over expenses of \$1,084,668.

Table 1.6.2 clearly sets out Retirement Living's financial performance from 1999 to 2005.

Table 1.6.2 Retirement Living financial performance, 1999–2005

Year	Total revenue	Excess of revenue over expenses	Current assets <sup>a</sup>	Total assets
1999 <sup>b</sup>	\$7,023,735	\$722,733	\$2,417,439	\$24,063,138
2000 <sup>c</sup>	\$6,973,257	\$1,150,446	\$2,760,347	\$24,778,345
2001 <sup>d</sup>	\$7,310,281	\$1,002,830	\$2,389,579	\$21,542,782
2002 <sup>e</sup>	\$7,613,010	\$612,860	\$2,428,049	\$22,102,754
2003 <sup>f</sup>	\$7,979,833	\$999,814	\$3,482,495	\$23,339,420
2004 <sup>g</sup>	\$8,344,905	\$1,084,668	\$3,188,974	\$23,543,276
2005 <sup>h</sup>	\$9,706,697	\$2,207,603 <sup>i</sup>	\$6,552,646	\$25,025,373

<sup>a</sup> Current assets are primarily made up of cash and investments. They also include accounts receivable, receivables from funding agencies, tax receivables, and prepaid expenses. Current assets do not include capital assets such as revenue-producing properties.

<sup>b</sup> Exhibit 1613; the figures are taken from the consolidated financial statement.

<sup>c</sup> Exhibit 1613; the figures are taken from consolidated financial statement.

<sup>d</sup> The figures are taken from non-consolidated financial statement.

<sup>e</sup> Exhibit 1599; the figures are taken from non-consolidated financial statement.

<sup>f</sup> Exhibit 1599; the figures are taken from non-consolidated financial statement. –

<sup>g</sup> Exhibit 688; the figures are taken from non-consolidated financial statement.

<sup>h</sup> Exhibit 2313; the figures are taken from non-consolidated financial statement.

<sup>i</sup> Retirement Living realized an increase in its cash and investments on hand to \$6,010,642 at year-end 2005 from \$2,849,537 at year-end 2004 attributable to the proceeds on disposal of revenue-producing properties.

## NorDev could afford to fix the roof

Before Retirement Living and NorDev completed their acquisition of the Mall, the principals of these two companies were generally aware of the capital expenditure that would be required to fix the roof. The Halsall report in 1999 was clear: the capital costs required to maintain and fix the roof ranged from \$443,000 under the first option to \$776,000 under the second.

The financial statements of NorDev and Retirement Living show that these related companies, individually or together, could have afforded to dedicate significant resources to repairing the roof during the time Retirement Living owned the Mall. Indeed, given the financial wherewithal of each company, it is clear to me that even Halsall's more comprehensive second option of finally installing a waterproof membrane could have been pursued.

In concluding that Retirement Living and NorDev had the capital available to pursue the options set out in the Halsall report, I am supported by Ms. Guertin's similar conclusion on this matter. During her examination by Commission counsel, Ms. Guertin made the following concession:

Q. ... [I]t is clear from looking at the financial performance of both companies that a different strategy could have been employed that would have involved a capital expenditure along the lines as was being proposed by Halsall, a one-time capital expenditure?

A. Halsall gave us two options.

Q. Right.

A. They recommended the first and that is what we implemented. If you are asking is there availability for capital projects? *Yes, the financial statements show that there is availability for capital projects.*<sup>425</sup> [Emphasis added].

## NorDev and Retirement Living chose to invest in other priorities, including \$1.3 million to attract Zellers, and \$1.4 to \$1.5 million in the golf course

In 2001, the NorDev Board of Directors made the decision to attract the department store Zellers as a tenant. As part of its effort, NorDev paid Zellers a lump sum of \$900,000 as an incentive and paid the then-tenant of the Zellers space, SAAN, a lump sum of \$400,000 to relocate.<sup>426</sup> In addition, NorDev invested \$81,100 in the food court area. Mr. Kennealy agreed that these were capital expenditures that the NorDev board decided to make.<sup>427</sup> Mr. Kennealy further agreed that NorDev had made the decision to invest its capital in projects *other than fixing the roof*. The following exchange between Commission counsel and Mr. Kennealy is revealing:

Q. [W]ould I be correct in concluding that at least at this stage [October 2001] NorDev had made decisions as to where it would spend its capital and it had decided to spend what capital it had available to it in the areas we have seen, rather than spend them in making capital improvements on the roof deck? That was a decision that the company made?

A. We had made a decision to manage it in the manner we did, yes.<sup>428</sup>

At the annual meeting of Retirement Living and NorDev held in February 2002, Mr. Farkouh presented the City's plans for a golf course and requested that Retirement Living and/or NorDev commit to supporting the initiative. The amount being requested by the City was \$1.1 million. At the meeting, the NorDev Board of Directors passed a resolution which provided that "the Board supports in principle, a significant contribution in 2004/2005 to the construction of a municipal golf course."<sup>429</sup>

Mr. Kennealy testified that, ultimately, NorDev invested approximately \$1.4 million to \$1.5 million in the golf course project.<sup>430</sup>

At a board of directors meeting of both Retirement Living and NorDev, Mr. Kennealy outlined the capital investments that would be undertaken in 2002. These included the renovation in the Hotel, a new Retirement Living customer lounge, and investments into the cosmetic appearance of Denison House (a lodge north of Elliot Lake that NorDev had purchased).<sup>431</sup>

Mr. Kennealy testified that, as these capital expenditures were being made in 2002, he did not recall any major issues with leaks in the Mall. In contrast, as noted above, in November 2002 Ms. Fazekas had complained to Mr. Kennealy of the "deplorable condition" at the Library from the water leaks.<sup>432</sup>

## NorDev paid Retirement Living over \$2 million

As previously mentioned, Retirement Living and NorDev were (and continue to be) intimately related companies. Among other things, they shared a board of directors, and Retirement Living was NorDev's only shareholder. Retirement Living had loaned NorDev \$2 million, which was secured by two mortgages.\* From 1999 until the mortgages were discharged on the sale of the Mall, NorDev paid Retirement Living \$698,398 in interest payments on those loans.<sup>433</sup>

• • • • •

\* See Exhibit 2334: Retirement Living held a mortgage in the amount of \$1 million with interest payments of 6.5 percent due semi-annually from 1999 to the sale of the Mall, and from 2001 to the sale of the Mall a second mortgage in the amount of \$1 million with interest payments of 7.4 percent due monthly.



In the period that NorDev owned the Mall, NorDev paid management fees to Retirement Living for the services of Mr. Kennealy, Ms. Guertin, and Mr. Quinn.<sup>434</sup> These management fees totalled \$392,167 from 1999 to 2005.<sup>435</sup> In addition, following the sale of the Mall, NorDev paid Retirement Living a dividend of \$1 million and a commission of \$186,000.<sup>436</sup>

In total, NorDev paid Retirement Living \$2,276,565 from the time that it acquired the Mall to the sale of the Mall by NorDev in 2005.<sup>437</sup>

## NorDev invested comparatively little to maintain the roof

In stark contrast to NorDev's investments of capital in other projects and its payments to Retirement Living described above, the company spent relatively minuscule amounts on the rooftop parking deck. The only capital investment that NorDev made in the roof was the erection of a steel barricade in 2003 at a cost of \$2,676.<sup>438</sup>

As I described above, leaks from the rooftop parking deck were an ongoing issue in the Mall during the period of NorDev's ownership. In spite of this problem, NorDev spent relatively paltry amounts of money to maintain the roof.

To determine the amount of money that NorDev expended on the maintenance of the parking deck during the period it owned the Mall, Ms. Guertin prepared for the Commission an analysis in which she estimated that NorDev likely expended approximately \$323,139 on maintenance of the rooftop parking deck.<sup>439</sup> Even accepting Ms. Guertin's analysis as being accurate, NorDev recovered more than half of these costs from the tenants of the Mall in the form of common area charges added to the tenants' rent.<sup>440</sup>

## NorDev and Retirement Living should have invested in the rooftop parking deck

The NorDev financial statements constitute clear evidence that it had the financial wherewithal to make meaningful capital expenditures to repair the rooftop parking deck – and perhaps to repair it permanently. As well, NorDev's parent company, Retirement Living, from whom it could readily borrow money, exhibited a consistently strong financial position throughout the time of its ownership of the Mall.

I described above some of the capital investments NorDev undertook while it owned the Mall, including the significant capital expenditures it made to attract Zellers to the Mall and to help build the golf course in Elliot Lake. These expenditures are manifest examples of the capital accessible to NorDev, but which it consistently dedicated to priorities other than repairing the roof.

I find that the amount NorDev ultimately allocated to the repair and maintenance of the roof – no more than \$160,000, net of common area charges recovered from the tenants – to be woefully low, particularly when juxtaposed against NorDev's other major expenditures and its strong financial position generally. In retrospect, these maintenance expenditures seem tragically inadequate.

**The NorDev financial statements constitute clear evidence that it had the financial wherewithal to make meaningful capital expenditures to repair the rooftop parking deck – and perhaps to repair it permanently.**

It is not my mandate, nor am I qualified, to say how Retirement Living and NorDev should have run their businesses. The impressive financial condition of both companies during the time that NorDev owned the Mall is doubtlessly attributable to their sound management and astute business practices. Nevertheless, I believe I can fairly comment on the decisions that were made in connection with the rooftop parking deck. In this regard, I find that the principals of NorDev and Retirement Living had their priorities wrong. If they had not invested in business opportunities to the exclusion of adequately repairing and maintaining the roof, perhaps the tragedy that befell Elliot Lake on June 23, 2012, could have been avoided. Even after making these investments, NorDev was evidently in a position to dedicate substantial monies to repair and maintain the rooftop parking deck. Regrettably, it chose not to make the needed repairs.

## Notes

- <sup>1</sup> Farkouh testimony, May 15, 2013, pp. 10052–3.
- <sup>2</sup> Bauthus testimony, March 25, 2013, pp. 2877–80.
- <sup>3</sup> Farkouh testimony, May 2, 2013, pp. 7964–6.
- <sup>4</sup> Bauthus testimony, March 25, 2013, p. 2883.
- <sup>5</sup> Farkouh testimony, May 2, 2013, pp. 7964–6.
- <sup>6</sup> Farkouh testimony, May 15, 2013, pp. 10053–4.
- <sup>7</sup> Exhibit 2143; see also Exhibit 2144.
- <sup>8</sup> Kennealy testimony, April 16, 2013, pp. 5165–6.
- <sup>9</sup> Farkouh testimony, May 2, 2013, pp. 7966–7.
- <sup>10</sup> Farkouh testimony, May 2, 2013, pp. 7966–7.
- <sup>11</sup> Farkouh testimony, May 2, 2013, pp. 7966–8.
- <sup>12</sup> Farkouh testimony, May 2, 2013, pp. 7966–8.
- <sup>13</sup> Exhibits 2143, 2144.
- <sup>14</sup> Kennealy testimony, April 16, 2013, p. 5166; Exhibit 2143.
- <sup>15</sup> Bauthus testimony, March 25, 2013, pp. 2885–7.
- <sup>16</sup> Kennealy testimony, April 16, 2013, pp. 5179–81.
- <sup>17</sup> Farkouh testimony, May 2, 2013, pp. 7973–4.
- <sup>18</sup> Farkouh testimony, May 2, 2013, p. 7974.
- <sup>19</sup> Kennealy testimony, April 16, 2013, p. 5184.
- <sup>20</sup> Kennealy testimony, April 16, 2013, pp. 5177–9.
- <sup>21</sup> Bauthus testimony, March 25, 2013, pp. 2880–1.
- <sup>22</sup> Exhibit 2146.
- <sup>23</sup> Guertin testimony, April 19, 2013, pp. 5822–3.
- <sup>24</sup> Quinn testimony, April 4, 2013, pp. 4809–10.
- <sup>25</sup> Bauthus testimony, March 25, 2013, pp. 2883–4.
- <sup>26</sup> Bauthus testimony, March 25, 2013, p. 2884.
- <sup>27</sup> Kennealy testimony, April 16, 2013, pp. 5189–92.
- <sup>28</sup> Farkouh testimony, May 2, 2013, pp. 7968–70.
- <sup>29</sup> Exhibit 2146.
- <sup>30</sup> Exhibit 2146.
- <sup>31</sup> Kennealy testimony, April 16, 2013, pp. 5191–2.
- <sup>32</sup> Kennealy testimony, April 16, 2013, p. 5191.
- <sup>33</sup> Farkouh testimony, May 2, 2013, pp. 7976–7.
- <sup>34</sup> Farkouh testimony, May 2, 2013, pp. 7981–2.
- <sup>35</sup> Hamilton testimony, July 8, 2013, pp. 14968–70.
- <sup>36</sup> Hamilton testimony, July 8, 2013, pp. 14957–8.
- <sup>37</sup> Hamilton testimony, July 8, 2013, pp. 14957–9; Exhibit 4213.
- <sup>38</sup> Exhibit 4213.
- <sup>39</sup> Denley testimony, June 4, 2013, pp. 12846–50.
- <sup>40</sup> Denley testimony, June 4, 2013, pp. 12846–7.
- <sup>41</sup> Collett testimony, May 23, 2013, pp. 11090–1.
- <sup>42</sup> Exhibit 3651; Collett testimony, May 23, 2013, pp. 11271–3.
- <sup>43</sup> See supplementary submissions of the City of Elliot Lake, May 29, 2014, pp. 3–4.
- <sup>44</sup> Exhibit 4215.
- <sup>45</sup> Farkouh testimony, May 2, 2013, p. 7977.
- <sup>46</sup> Farkouh testimony, May 2, 2013, pp. 8126–7.
- <sup>47</sup> Kennealy testimony, April 16, 2013, pp. 5214–15.
- <sup>48</sup> Kennealy testimony, April 16, 2013, p. 5221.
- <sup>49</sup> Farkouh testimony, May 2, 2013, pp. 8127–8.
- <sup>50</sup> Kennealy testimony, April 16, 2013, pp. 5214–17.
- <sup>51</sup> Kennealy testimony, April 16, 2013, pp. 5222–3.
- <sup>52</sup> Exhibit 2148; Kennealy testimony April 16, 2013, pp. 5231–2.
- <sup>53</sup> Bauthus testimony, March 26, 2013, pp. 2981–2.
- <sup>54</sup> Farkouh testimony, May 2, 2013, pp. 8129–31.
- <sup>55</sup> Exhibit 3224.
- <sup>56</sup> Farkouh testimony, May 2, 2013, pp. 8129–31.
- <sup>57</sup> Kennealy testimony, April 16, 2013, pp. 5239–41.
- <sup>58</sup> Farkouh testimony, May 2, 2013, p. 8131.
- <sup>59</sup> Bauthus testimony, March 26, 2013, p. 2983.
- <sup>60</sup> Kennealy testimony, April 16, 2013, p. 5239.
- <sup>61</sup> Bauthus testimony, March 26, 2013, p. 2984.
- <sup>62</sup> Exhibit 2098.
- <sup>63</sup> Bauthus testimony, March 26, 2013, p. 2990.
- <sup>64</sup> Kennealy testimony, April 16, 2013, pp. 5245–6.
- <sup>65</sup> Kennealy testimony, April 16, 2013, pp. 5253–8.
- <sup>66</sup> Leistner testimony, March 27, 2013, pp. 3450–1.
- <sup>67</sup> Bauthus testimony, March 26, 2013, pp. 2990–2.
- <sup>68</sup> Bauthus testimony, March 26, 2013, pp. 2992–3.
- <sup>69</sup> Bauthus testimony, March 26, 2013, p. 2994; Farkouh testimony May 2, 2013, p. 8135.
- <sup>70</sup> Bauthus testimony, March 26, 2013, pp. 3121–2.
- <sup>71</sup> Exhibit 3226.
- <sup>72</sup> Exhibit 3226.
- <sup>73</sup> Exhibit 3226.
- <sup>74</sup> Exhibit 3270.
- <sup>75</sup> Exhibits 2150, 2151.
- <sup>76</sup> Exhibit 390.
- <sup>77</sup> Exhibit 390.
- <sup>78</sup> Exhibits 3280, 3281, 3282.
- <sup>79</sup> Exhibit 2089.
- <sup>80</sup> Leistner testimony, March 27, 2013, pp. 3454–5.
- <sup>81</sup> Exhibit 874.
- <sup>82</sup> Guertin testimony, April 19, 2013, pp. 5847–8.
- <sup>83</sup> Guertin testimony, April 19, 2013, pp. 5843–6.
- <sup>84</sup> Exhibit 874.
- <sup>85</sup> Guertin testimony, April 19, 2013, pp. 5859–60.
- <sup>86</sup> Exhibit 874.
- <sup>87</sup> Nicholls testimony, April 30, 2013, pp. 7267–68.
- <sup>88</sup> Guertin testimony, April 19, 2013, pp. 5862–3.
- <sup>89</sup> Kennealy testimony, April 17, 2013, pp. 5311–12.
- <sup>90</sup> Exhibit 3227.
- <sup>91</sup> Exhibit 3227.
- <sup>92</sup> Exhibit 3227.
- <sup>93</sup> Exhibit 3227.
- <sup>94</sup> Kennealy testimony, April 17, 2013, p. 5330.
- <sup>95</sup> Bauthus testimony, March 26, 2013, pp. 2993–4, 3015.
- <sup>96</sup> Exhibit 249.
- <sup>97</sup> Exhibit 249.
- <sup>98</sup> Bauthus testimony, March 26, 2013, pp. 3027–8.
- <sup>99</sup> Burling testimony, April 2, 2013, pp. 3852–3.
- <sup>100</sup> Burling testimony, April 2, 2013, pp. 3858–9.
- <sup>101</sup> Exhibit 3233.
- <sup>102</sup> Exhibit 3233.
- <sup>103</sup> Bauthus testimony, March 26, 2013, p. 3032.
- <sup>104</sup> Kennealy testimony, April 17, 2013, pp. 5342–3.
- <sup>105</sup> Farkouh testimony, May 2, 2013, pp. 8158–60.
- <sup>106</sup> Bauthus testimony, March 26, 2013, pp. 3038–40.
- <sup>107</sup> Kennealy testimony, April 17, 2013, pp. 5286–9.
- <sup>108</sup> Guertin testimony, April 19, 2013, pp. 5879–80.
- <sup>109</sup> Farkouh testimony, May 2, 2013, p. 8164.
- <sup>110</sup> Kennealy testimony, April 17, 2013, pp. 5286–90.
- <sup>111</sup> Exhibit 3234.
- <sup>112</sup> Farkouh testimony, May 2, 2013, pp. 8161–2.
- <sup>113</sup> Bauthus testimony, March 26, 2013, p. 3036.
- <sup>114</sup> Speck testimony, April 24, 2013, pp. 6702–5.



- <sup>115</sup> See supplementary submissions of the City of Elliot Lake, May 29, 2014, pp. 8–9.
- <sup>116</sup> Exhibit 2153.
- <sup>117</sup> Guertin testimony, April 19, 2013, pp. 5881–3.
- <sup>118</sup> Guertin testimony, April 19, 2013, pp. 5828–9.
- <sup>119</sup> Nicholls testimony, April 30, 2013, pp. 7274–5.
- <sup>120</sup> Exhibit 874.
- <sup>121</sup> Nicholls testimony, April 30, 2013, pp. 7276–7.
- <sup>122</sup> Exhibit 69.
- <sup>123</sup> Nicholls testimony, April 30, 1998, p. 7285.
- <sup>124</sup> Nicholls testimony, April 30, 1998, p. 7297.
- <sup>125</sup> Guertin testimony, April 19, 2013, p. 5892.
- <sup>126</sup> Nicholls testimony, April 30, 1998, pp. 7286–7.
- <sup>127</sup> Exhibit 874.
- <sup>128</sup> Guertin testimony, April 19, 2013, pp. 5897–9.
- <sup>129</sup> Exhibit 69.
- <sup>130</sup> Exhibit 874.
- <sup>131</sup> Luciw testimony, April 10, 2013, pp. 4741–2.
- <sup>132</sup> Luciw testimony, April 10, 2013, pp. 4747–8.
- <sup>133</sup> Luciw testimony, April 10, 2013, pp. 4747–9.
- <sup>134</sup> Leistner testimony, March 27, 2013, pp. 3476–9.
- <sup>135</sup> Kennealy testimony, April 17, 2013, pp. 5868–9.
- <sup>136</sup> Luciw testimony, April 10, 2013, pp. 4726–7.
- <sup>137</sup> Exhibit 394.
- <sup>138</sup> Leistner testimony, March 27, 2013, pp. 3485–6.
- <sup>139</sup> Exhibit 3274.
- <sup>140</sup> Exhibit 721.
- <sup>141</sup> Kennealy testimony, April 17, 2013, pp. 5401–4.
- <sup>142</sup> Exhibit 2157.
- <sup>143</sup> Kennealy testimony, April 17, 2013, pp. 5404–5.
- <sup>144</sup> Farkouh testimony, May 2, 2013, pp. 8166–7.
- <sup>145</sup> Exhibit 2090.
- <sup>146</sup> Exhibit 2091.
- <sup>147</sup> Exhibit 2090.
- <sup>148</sup> Exhibit 2158.
- <sup>149</sup> Kennealy testimony, April 17, 2013, pp. 5428–30.
- <sup>150</sup> Guertin testimony, April 19, 2013, pp. 5915–17.
- <sup>151</sup> Guertin testimony, April 19, 2013, p. 5873.
- <sup>152</sup> Bauthus testimony, March 26, 2013, p. 3048.
- <sup>153</sup> Guertin testimony, April 19, 2013, pp. 5916–18.
- <sup>154</sup> Bauthus testimony, March 26, 2013, p. 3048.
- <sup>155</sup> Exhibit 2324.
- <sup>156</sup> Kennealy testimony, April 17, 2013, p. 5426.
- <sup>157</sup> Kennealy testimony, April 17, 2013, p. 5433.
- <sup>158</sup> Kennealy testimony, April 17, 2013, p. 5436.
- <sup>159</sup> Kennealy testimony, April 17, 2013, pp. 5434–5.
- <sup>160</sup> Guertin testimony, April 19, 2013, pp. 5919–20.
- <sup>161</sup> Exhibits 2159, 463.
- <sup>162</sup> Exhibit 3284.
- <sup>163</sup> Exhibit 2092.
- <sup>164</sup> Kennealy testimony, April 17, 2013, pp. 5413–14, 5419.
- <sup>165</sup> Kennealy testimony, April 17, 2013, pp. 5436–7.
- <sup>166</sup> Exhibit 66.
- <sup>167</sup> Exhibit 66.
- <sup>168</sup> Exhibit 66.
- <sup>169</sup> Exhibit 66.
- <sup>170</sup> Nicholls testimony, April 30, 2013, pp. 7328–9.
- <sup>171</sup> Kennealy testimony, April 17, 2013, pp. 5352–3.
- <sup>172</sup> Kennealy testimony, April 17, 2013, p. 5347.
- <sup>173</sup> Guertin testimony, April 19, 2013, pp. 5952–3.
- <sup>174</sup> Pigeau testimony, March 22, 2013, pp. 2625–6.
- <sup>175</sup> Kennealy testimony, April 17, 2013, pp. 5446–8.
- <sup>176</sup> Kennealy testimony, April 17, 2013, pp. 5451–5.
- <sup>177</sup> Guertin testimony, April 19, 2013, pp. 5933–5.
- <sup>178</sup> Farkouh testimony, May 2, 2013, p. 8186.
- <sup>179</sup> Kennealy testimony, April 17, 2013, pp. 5462–4.
- <sup>180</sup> Exhibit 3240.
- <sup>181</sup> Exhibit 2094.
- <sup>182</sup> Exhibit 3276.
- <sup>183</sup> Exhibit 2093.
- <sup>184</sup> Kennealy testimony, April 17, 2013, pp. 5459–60.
- <sup>185</sup> Guertin testimony, April 19, 2013, pp. 5941–3.
- <sup>186</sup> Guertin testimony, April 19, 2013, pp. 5952–3.
- <sup>187</sup> Guertin testimony, April 19, 2013, pp. 5946–8.
- <sup>188</sup> Kennealy testimony, April 17, 2013, pp. 5469–70.
- <sup>189</sup> Guertin testimony, April 19, 2013, p. 5947.
- <sup>190</sup> Exhibit 2168.
- <sup>191</sup> Guertin testimony, April 19, 2013, p. 5943.
- <sup>192</sup> Kennealy testimony, April 17, 2013, pp. 5474–5.
- <sup>193</sup> Exhibit 2168.
- <sup>194</sup> Guertin testimony, April 19, 2013, pp. 5944–5.
- <sup>195</sup> Exhibit 2168.
- <sup>196</sup> Exhibit 1525.
- <sup>197</sup> Exhibit 710.
- <sup>198</sup> Leistner testimony, March 27, 2013, pp. 3519–20.
- <sup>199</sup> Kennealy testimony, April 17, 2013, pp. 5501–2.
- <sup>200</sup> Exhibit 710.
- <sup>201</sup> Exhibit 00007-00002.
- <sup>202</sup> Exhibit 00007-00002.
- <sup>203</sup> Kennealy testimony, April 17, 2013, pp. 5503–4.
- <sup>204</sup> Kennealy testimony, April 17, 2013, p. 5507.
- <sup>205</sup> Guertin testimony, April 19, 2013, pp. 5956–7.
- <sup>206</sup> Exhibit 2182.
- <sup>207</sup> Guertin testimony, April 19, 2013, pp. 5961–5.
- <sup>208</sup> Kennealy testimony, April 17, 2013, pp. 5513–14.
- <sup>209</sup> Guertin testimony, April 19, 2013, pp. 5964–5.
- <sup>210</sup> Exhibit 711.
- <sup>211</sup> Kennealy testimony, April 17, 2013, pp. 5520–1.
- <sup>212</sup> Exhibit 2183.
- <sup>213</sup> Exhibit 1466.
- <sup>214</sup> Exhibit 70.
- <sup>215</sup> Kennealy testimony, April 17, 2013, pp. 5532–3.
- <sup>216</sup> Exhibit 70.
- <sup>217</sup> Kennealy testimony, April 17, 2013, pp. 5527–30.
- <sup>218</sup> Exhibit 70.
- <sup>219</sup> Kennealy testimony, April 18, 2013, pp. 5555–7, 5564.
- <sup>220</sup> Kennealy testimony, April 18, 2013, pp. 5564–7.
- <sup>221</sup> Speck testimony, April 24, 2013, pp. 6740–1, 6732.
- <sup>222</sup> Speck testimony, April 24, 2013, p. 6738.
- <sup>223</sup> Exhibit 3252.
- <sup>224</sup> Exhibit 8-4.
- <sup>225</sup> Buckley testimony, April 8, 2013, p. 4417.
- <sup>226</sup> Truman testimony, April 9, 2013, p. 4513.
- <sup>227</sup> Exhibit 70.
- <sup>228</sup> Exhibit 70.
- <sup>229</sup> Exhibit 70.
- <sup>230</sup> Exhibit 70.
- <sup>231</sup> Exhibit 70.

- <sup>232</sup> Exhibit 66, p. 56.
- <sup>233</sup> Truman testimony, April 9, 2013, pp. 4593–4.
- <sup>234</sup> Truman testimony, April 9, 2013, pp. 4593–4.
- <sup>235</sup> Exhibit 70.
- <sup>236</sup> Exhibit 70.
- <sup>237</sup> Exhibit 70.
- <sup>238</sup> Exhibit 70.
- <sup>239</sup> Exhibit 71.
- <sup>240</sup> Buckley testimony, April 8, 2013, pp. 4427–8.
- <sup>241</sup> Buckley testimony, April 8, 2013, p. 4434.
- <sup>242</sup> Buckley testimony, April 8, 2013, pp. 4429–30.
- <sup>243</sup> Buckley testimony, April 8, 2013, p. 4400; Truman testimony, April 9, 2013, p. 4600.
- <sup>244</sup> Truman testimony, April 9, 2013, pp. 4603–4.
- <sup>245</sup> Nicholls testimony, April 30, 2013, pp. 7330–1.
- <sup>246</sup> Nicholls testimony, April 30, 2013, pp. 7337–9.
- <sup>247</sup> Buckley testimony, April 8, 2013, pp. 4446–7.
- <sup>248</sup> Exhibit 70.
- <sup>249</sup> Exhibit 69.
- <sup>250</sup> Exhibit 70.
- <sup>251</sup> Truman testimony, April 9, 2013, p. 4601.
- <sup>252</sup> Truman testimony, April 9, 2013, pp. 4601–2.
- <sup>253</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12337–8; (Hughes) May 30, 2013, pp. 12600–1.
- <sup>254</sup> Truman testimony, April 9, 2013, p. 4618.
- <sup>255</sup> Exhibit 71.
- <sup>256</sup> Truman testimony, April 9, 2013, p. 4671.
- <sup>257</sup> Buckley testimony, April 8, 2013, pp. 4397–8.
- <sup>258</sup> Truman testimony, April 9, 2013, p. 4645.
- <sup>259</sup> Truman testimony, April 9, 2013, pp. 4617–18; Buckley testimony, April 8, 2013, pp. 4405–6.
- <sup>260</sup> NORR testimony, May 30, 2013, pp. 12589–90.
- <sup>261</sup> Quinn testimony, April 11, 2013, pp. 4876–8.
- <sup>262</sup> Quinn testimony, April 16, 2013, p. 5143.
- <sup>263</sup> Quinn testimony, April 16, 2013, pp. 5143–4.
- <sup>264</sup> Quinn testimony, April 11, 2013, p. 4889.
- <sup>265</sup> Quinn testimony, April 16, 2013, p. 5142.
- <sup>266</sup> Exhibit 70.
- <sup>267</sup> Kennealy testimony, April 17, 2013, pp. 5540–1.
- <sup>268</sup> Snow testimony, April 3, 2013, p. 3973.
- <sup>269</sup> Quinn testimony, April 11, 2013, pp. 4905–6.
- <sup>270</sup> Quinn testimony, April 16, 2013, pp. 4978–9.
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- <sup>272</sup> Quinn testimony, April 11, 2013, pp. 4923–4.
- <sup>273</sup> Quinn testimony, April 11, 2013, pp. 4924–6; Exhibit 2181.
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- <sup>275</sup> Quinn testimony, April 11, 2013, pp. 4927–9.
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- <sup>277</sup> Quinn testimony, April 11, 2013, pp. 4937–8.
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- <sup>335</sup> Exhibits 6-6, 6-7.
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SECTION



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# The Eastwood Years 2005–12

*Eastwood owner Bob Nazarian repeatedly promised the City and his tenants that the leaking roof of the Mall would be fixed, and he appeared to take steps to do so. Unfortunately, that appearance was not a reality. Although he hired – or announced he had hired – a number of consultants and contractors, he resiled from contracts to which he had agreed, fired the people he had hired, or failed to move forward after receiving partial advice.*

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## Eastwood Mall Inc. and the Nazarian family

Eastwood Mall Inc. (Eastwood) was the owner of the Algo Centre on June 23, 2012, the day of the collapse. It bought the Mall in August 2005, and all who testified on the ownership reported that the corporation was wholly owned by Bob Nazarian.

### Bob Nazarian's background and business interests

Bob Nazarian was born in Iran on July 23, 1945. He worked there as a machinist and an industrial manufacturer and was involved in building water pumps and hydraulic digging machines. He came to Canada in 1971 and lived in Montreal for 15 years, working as a tool and die maker and a plastic mould maker. While in Montreal, he co-owned a hydraulic manufacturing company and, at some point, he sold his interest in that company to his brother. Bob Nazarian moved to Hamilton, Ontario, where he invested in several apartment buildings in different cities and began developing shopping centres. In the beginning, he purchased shopping centres outside city centres and renovated them. He testified that he would bring in new tenants, increase the shopping centre's income, and then sell it and buy another. At the same time, he was also involved with some land development and construction work.<sup>1</sup>

### Members of the Nazarian family

Bob Nazarian is married to Irene Nazarian, and they have two children, Levon and Armen. (Armen, the younger son, was a student throughout the time that Eastwood owned the Algo Centre.) Levon Nazarian was born in 1983. He graduated from York University, Toronto, in 2007 with a bachelor of arts in public policy and business management. He was licensed as a real estate agent in 2009 and as a real estate broker in 2012. Since June 27, 2012, he has run his own brokerage firm in Richmond Hill, Ontario, Re/Max Infinite Inc. He testified that he is not an officer of Eastwood and does not work for that corporation directly but has worked for it indirectly as a real estate broker and leasing manager. As is described later in this Report, he also attempted to obtain financing for it and managed the project to develop a new parking lot. He was heavily involved in the attempts to sell the Algo Centre.<sup>2</sup>

### Bob and Levon Nazarian as witnesses and documents produced by and for them are not credible

Neither Bob Nazarian nor his son Levon was a credible witness. They both testified for an extensive period of time – Bob Nazarian over seven days, and Levon over four days. Faced with challenging questions, they frequently gave evasive answers, professing not to recall events or facts in circumstances where they ought to have been able to. They each gave evidence that contradicted their own earlier evidence. Bob Nazarian often refused to give a responsive answer to questions, stating either “no comment” or “it is possible” to questions requiring either a “yes” or “no” answer. Their evidence frequently was in conflict with contemporaneous documentary evidence produced by others. Bob Nazarian, in particular, was sometimes defiant and truculent in the witness box. Documents produced by or at the direction of both men were themselves contradictory. Frequently, information on the same subject differed between documents, leading any fair-minded observer to justifiably suspect a self-serving purpose.

In addition, throughout the period of their involvement with the Mall, the Nazarians engaged in conduct that was often, in my opinion, deliberately deceptive and unscrupulous. Numerous instances of such behaviour will be described later in this section. That aspect of their character reinforces my generally dismal view of their trustworthiness as witnesses. Without reliable corroboration, I find it difficult to rely on their evidence, unless it amounts to an admission against their own interests or for other good and articulable reason. Where their evidence is in conflict with evidence of another apparently credible witness, I have, unless stated otherwise, preferred the evidence of the other witness. In my view, it would be unsafe to do otherwise.

### **Eastwood Mall Inc., its shareholders, and related corporations**

Eastwood Mall Inc. is the company that owns the Algo Centre. Both Bob Nazarian and Levon Nazarian testified that Bob Nazarian is and has always been the sole shareholder of that company. He is also its president.<sup>3</sup>

Both Bob Nazarian and Levon Nazarian testified that Yorkdale Group Inc. and Yorkdale Centre Inc. are corporations owned by four equal shareholders: Bob Nazarian, Irene Nazarian, Levon Nazarian, and Armen Nazarian.<sup>4</sup> The 2009 income tax return for Yorkdale Group Inc., however, showed Bob Nazarian as the sole shareholder.<sup>5</sup> When confronted with this discrepancy, Bob Nazarian stated that he was at that time the only shareholder in that company and in Yorkdale Centre Inc. and that, sometime after, he gave one quarter of the shares in each company to each family member. He stated his earlier testimony had been a mistake.<sup>6</sup> He also testified that his son Levon was “virtually C.E.O. of those companies” reporting to him.<sup>7</sup>

Both Bob and Levon Nazarian testified that another corporation, Westgate Inc., at some point amalgamated into Yorkdale Centre Inc. Levon Nazarian could not recall whether Westgate Inc. had the same four shareholders as Yorkdale Centre Inc. Bob Nazarian testified that Westgate Inc. was owned by him, his wife, and his two sons in equal shares.<sup>8</sup>

I am not able to reach a conclusion about the precise ownership interest in each of these corporations at any point in time. However, as I set out below, Bob Nazarian treated all of these corporations as affiliated. The money in each, and his personal assets, were available to any of them.

### **2005: NorDev / Retirement Living sold a “black hole” to Eastwood**

The evidence before me was overwhelming that the Mall leaked virtually from the day it opened. Although the leaks never completely stopped, the Mall’s appearance nevertheless improved somewhat with its second owner, Retirement Living, through its for-profit subsidiary NorDev. The same, unfortunately, could not be said of the Mall’s third and last owner, Eastwood. As I describe below, the Mall’s demise can certainly be partially attributable to Bob Nazarian. However, questions were raised during the Inquiry as to whether Mr. Nazarian was duped into buying the property without having been provided with the true facts about its physical condition. As I explain further below, while I face conflicting evidence on this difficult and somewhat tangled issue, I find that Mr. Nazarian’s version of events on this issue is the more plausible one.



## Retirement Living decides to sell to get its money out

Richard Kennealy, general manager of Retirement Living, testified that the decision to put the Mall on the market was made following internal discussions in the fall of 2004 and not as result of expressions of interest. Retirement Living was involved in a lot of projects in the community, including the golf course, the lakefront/waterfront development project, and a nursing home. Management of the Hotel required significant resources and manpower, including attracting events to the community.<sup>9</sup> The Retirement Living managers were all very busy. Mr. Kennealy testified:

We were trying to move on to other things. It sort of wasn't our goal to be in the retail mall business forever. Many things that we have gotten involved with the community over the ... 20 years that I have been here, we would get involved in something, try and ... fix it, try and get it back on track, try to get it moving in a positive direction, and then if things are going well, then move on.

And the Mall was very much that type of a situation. And so it was resource consumption in terms of human resources. We felt it an appropriate time to recapture some of the financial resources.<sup>10</sup>

Al Collett, then a representative of the Chamber of Commerce on the board of directors of Retirement Living, and Richard Hamilton, who was a councillor at the time and the City representative on the board, both testified that Retirement Living wanted to see the Mall return to a private sector owner because there was some concern among members of the board that this not-for-profit corporation was competing with local businesses. The board members wanted Retirement Living to focus on its core activities.<sup>11</sup>

Retirement Living believed it had fixed the problem it had identified with the Mall – which Mr. Kennealy identified not as the leaks but as the “retail mix.” He testified that Retirement Living had brought in better department stores, such as Zellers and A Buck or Two, and had ensured that the majority of the leases extended over a five-year period and beyond. Retirement Living felt that the market was such that it was a good time to sell the Mall.<sup>12</sup>

**Retirement Living believed it had fixed the problem it had identified with the Mall – which Mr. Kennealy identified not as the leaks but as the “retail mix.”**

On March 3, 2005, at the annual meeting of NorDev, Mr. Kennealy described the good financial performance of the Mall and the “exceptional” performance of the Algo Inn. He presented to the board the 2005 business plan in which he advised that one of the 2005 objectives was to “explore the opportunities for the sale of NorDev’s retail mall holdings.”<sup>13</sup> He further informed the board:

As the board knows, we are exploring opportunities for the sale of the mall not including the hotel. We have had one strong expression of interest and we anticipate a formal offer to be made in the near future. As with any sale, this offer may not result in an outcome satisfactory to both parties. We therefore will be going to market aggressively in Mid-March. For your review, I have included a copy of the package we will use.<sup>14</sup>

Mayor George Farkouh, who as one of City Council’s appointees to the board was present at the meeting, testified that he thought the potential sale was a positive move because it would bring new investors into the community and allow Retirement Living to free up its financial and human resources for other projects. He thought Retirement Living had increased the value of the Mall during its time by bringing in Zellers, signing long-term leases with other major tenants, and improving the looks of the Mall. As the mayor and as a member of the board, he agreed with those expenditures.<sup>15</sup>

## April 2005: Bob Nazarian made an offer to purchase the Mall without much consideration

On March 31, 2005, Bob Nazarian signed a non-disclosure covenant in which he agreed not to disclose any of the confidential information provided to him by Retirement Living and NorDev about the Algo Mall. Mr. Nazarian testified that he learned about the possibility of buying the Algo Mall from his friend, Michael Sobhi, a real estate agent. Mr. Sobhi informed him that the income of the Algo Mall was appealing, as were the anchor tenants, such as Zellers, Sobeys, the Elliot Lake Public Library, and Dollarama.<sup>16</sup> Mr. Nazarian further testified that, on April 1, 2005, he visited the Mall and did not see any evidence of leakage inside the Mall: he saw no leaks, no water buckets, and no tarps.<sup>17</sup> Ken Snow (the Mall's maintenance supervisor during the Algocen and Retirement Living ownership periods) testified that, at the time of sale of the Mall to Eastwood, the leak situation was "generally okay."<sup>18</sup>

Bob Nazarian testified that, on the same day, he met with Mr. Kennealy, Rhona Guertin (Retirement Living's finance and business development manager), and Mr. Sobhi (who was acting as Mr. Nazarian's agent) at the Retirement Living offices in the Mall. He was given a sales brochure which described, among other things, the lease profile of the Mall and the capital improvements made to it. The brochure made no reference to the roof of the Mall or the leaks.<sup>19</sup> He testified that Mr. Kennealy and Ms. Guertin did not mention any issues with the Mall and were very positive about the Mall's future growth. His evidence was that he asked if there were any problems with the Mall:

I told them if there is any kind of documents, any kind of information you can give me or any defect in the mall, I would like to know now rather than later. They said that the mall is in sound situation, there is nothing wrong with that.<sup>20</sup>

According to Bob Nazarian, no one told him prior to entering into the agreement of purchase and sale with Retirement Living that the building had leaked from the date it was built. When he entered into that agreement, he had no information to suggest that work would be necessary on the parking roof deck of the Mall.<sup>21</sup> He testified that he asked Mr. Kennealy and Ms. Guertin at the April 1, 2005, meeting whether they had any engineering reports, including any structural reports, detailing any kind of defect with the Mall, and that he was not provided with any reports.<sup>22</sup> In response to questions from his own counsel, Mr. Nazarian testified that when he examined the Mall, he saw "improvements" that he wanted to make to the property, such as painting it. He also wanted to adjust the slope of the ground level parking lot by Ontario Street and renovate and improve the parking conditions.<sup>23</sup>

On April 1, 2005, after his meeting with Mr. Kennealy and Ms. Guertin, Bob Nazarian signed an offer to purchase the Mall for \$8.2 million. The offer was made conditional on several things, including:

- the purchaser's approval of inspection results of the property by a qualified inspector (clause 3(c));
- "All municipal and other governmental requirements and the requirements of the insurers of the premises being complied with as of closing and there being no outstanding work orders or requirements issued by the building, fire, health or labour departments or any other authority having jurisdiction requiring any repairs, work, changes or additions to be made" (clause 3(e));
- the purchaser being able to arrange financing (clause 3(g));
- "The Vendor represent[ing] that all heating, plumbing, sprinkler and electrical systems and elevators will be in good repair and working order as of closing, and as of closing, the premises will comply with all municipal and other governmental requirements and the requirements of the insurers of the premises. The Vendor further represent[ing] that it is not aware of any major defect in the structure of the building or of any major defect in the fixtures, chattels and equipment that form part of this Agreement" (clause 6); and

- the seller representing and warranting that “as at the date of closing there will be no work orders outstanding with any municipal or government authority with respect to the subject property and the Seller shall not have received written notice of any work orders or deficiency notices or letters capable of becoming work orders or deficiency notices from any municipal or governmental authority and that the current use of the subject property does not breach any municipal, provincial or federal environmental legislation, by-law or regulations” (clause 10(f)).<sup>24</sup>

Bob Nazarian testified that he included clause 6 – the representation by NorDev that it was not aware of any major defect in the structure of the building – to make sure that, if there were any defect, he would know about it.<sup>25</sup> However, as discussed below, he later chose to waive this condition.

## April 2005: Retirement Living’s counter-offer

On April 5, 2005, a special meeting of the NorDev / Retirement Living board of directors was called to review the offer by Bob Nazarian to purchase the Mall. The board was advised that

- the motivation to sell the property by NorDev was to recapture human resources currently invested in managing the property and focus on future developments, recapture funds invested in the property, and realize value appreciation;
- as part of the key characteristics of a sale, the “[p]urchaser should be experienced in the industry” and the “[p]urchasers [sic] motivation should be to grow the business”; and
- the timing is right for the sale as, among other things, the “[p]roperty is in a good physical state.”<sup>26</sup>

Ms. Guertin testified that she believed it was important that the person who bought the Mall had experience in the industry and showed interest in running it as a business. She thought that Mr. Kennealy was aware of Bob Nazarian’s other business involvements. She had no idea of the condition of his other ventures, but she was aware that he did own other shopping centres in Ontario.<sup>27</sup>

Although Retirement Living may, on grounds I cannot discern, have concluded that Mr. Nazarian was a purchaser with “experience in the industry” and “motivated to grow the business,” that conclusion does not accord with the facts. He certainly does not appear to have had any experience in the long-term management of the malls he previously owned. As I indicate below, Mr. Nazarian was eager to sell the Mall from the moment he bought it. That was what he had done in the past with the other shopping centres he had bought. He sold all of them for a good profit a short time after purchasing them. There was no reason to believe that he would do anything different with the Algo Mall.

During the special meeting, the board passed a resolution authorizing the general manager and the chair of the board to enter into a contract with Bob Nazarian (in trust) for the sale of the Algo Centre, with the reservation of a lease for the Hotel and the present Elliot Lake Retirement Living office, on terms satisfactory to them and to the corporate secretary, for the amount of \$8.2 million. The board also agreed that in the course of the due diligence procedure, if the purchaser identified a legitimate reason for discounting the purchase price agreed to, the general manager and the chair were authorized to agree to reductions not to exceed \$700,000.<sup>28</sup> Mayor Hamilton, who was present at the meeting, testified that there was no discussion of the leaks or of the physical condition of the Mall.<sup>29</sup>



On April 7, 2005, NorDev made a counter-offer to Bob Nazarian agreeing to his purchase price but proposing new covenants, including the following preamble:

The following provisions are incorporated into the contract at the request of the Vendor. These provisions represent a counteroffer and where there is a conflict between this Schedule and the Offer of April 1, 2005, this Schedule [Schedule C – see below] shall prevail.<sup>30</sup>

Bob Nazarian accepted the counter-offer on April 13, 2005. He testified that he read the above clause and understood its meaning.<sup>31</sup> In addition to the right by the purchaser to access the property to conduct inspections (clause 5), schedule C provided:

8. *The Purchased Assets will be purchased and assumed by the Purchaser "As Is" and on Closing, the Purchaser shall assume responsibility for the physical condition of the Purchased Assets and the Vendor shall have no obligations or responsibility to the Purchaser after Closing with respect to the Purchased Assets or the condition thereof.*<sup>32</sup> [Emphasis added.]

Mr. Kennealy testified that although he knew that this clause was a condition of the counter-offer, he did not know whether the condition was inserted at NorDev's insistence and why it was included. He had no recollection of discussing it.<sup>33</sup> Bob Nazarian testified that he did not think he had read this clause at the time, but understood its meaning: "That means even if it is a lemon, I have accepted."<sup>34</sup> The effect of this clause was that, once accepted, the representation by NorDev that it was not aware of any major defect in the structure of the building disappeared.

Nonetheless, Mr. Kennealy testified he thought that in 2005 it was true that Retirement Living was not aware of any major defect in the structure of the building.<sup>35</sup> When asked if he thought that water infiltration was a major defect in the building, he said:

I think it is something that you want to manage and control as much as possible. You work very hard to make sure it doesn't get through.<sup>36</sup>

In effect, Mr. Kennealy did not answer the question, and the issue was not pursued.

## **Retirement Living did not provide Bob Nazarian with the engineering reports it had about the Mall**

As I noted above, Algocen did not provide any engineering reports to Retirement Living when it purchased the Mall, although Retirement Living indicated that it had asked for them. This matter of engineering reports was also a live issue with respect to the sale of the Mall to Eastwood, with contradictory evidence from the vendor and the purchaser.

Bob Nazarian testified that, after the agreement of purchase and sale was signed and he agreed to the counter-offer, he requested engineering reports from Retirement Living several times. He indicated that he specifically requested engineering, electrical, and mechanical reports and any other information that would be useful to him. He received nothing.<sup>37</sup> Mr. Nazarian explained that, a week after the agreement was signed, he received, at a meeting held at his home with Mr. Kennealy, Ms. Guertin, and Marielle Brown (Retirement Living's director of marketing), a banker's box full of tenants' leases but no reports. He testified that he was told several times by Mr. Kennealy and Ms. Guertin that they did not have any engineering reports.<sup>38</sup>

Bob Nazarian's evidence was that he did not see the 1991 Trow report,<sup>39</sup> the 1994 Trow report,<sup>40</sup> the 1995 letter report from Trow,<sup>41</sup> the Paul Meyer report,<sup>42</sup> the 1998 Nicholls Yallowega Bélanger report,<sup>43</sup> the 1998 Halsall report,<sup>44</sup> or the 1999 Halsall report<sup>45</sup> before the Mall's collapse. He testified that if he had seen the two options proposed by Halsall in its 1999 report, it would have affected the negotiations. He said that he would not have bought the Mall if he had been told that these two options had been recommended, but neither one carried out. He also testified that he would not have bought the Mall had he known that the leaks had been continuing for so long.<sup>46</sup>

Mr. Kennealy's evidence was different. When asked whether he told Bob Nazarian about the leaks, he testified:

Yes, yeah, we talked – during the course of those four or whatever number of months it was until completion, we had a number of discussions. We talked ... quite openly about the fact that there were leaks in the parking deck. We talked about the maintenance program that we had implemented. In fact, I recall speaking with him in terms of when we bought the mall, we had someone come in and do an assessment and they gave us two options and we selected one of those patterns to move forward with the maintenance of the mall, the parking deck.

We talked about a variety of things in relation to the different things that we did in terms of ... using sand and using the light snow trucks or trucks for plowing ... we talked about a lot of things. We talked about the fact that it had been sort of a continual problem since construction or design, whatever you want to call it.

... I remember speaking about [how] our guys would use the traffic flow things, which was a habit ACP [Algoma Central Properties] used to try and make sure traffic was travelling over the concourse in a distributed manner.

What else did we talk about? ... I can remember having a specific conversation about saying it is a lot of work, that you have to ... be very focussed on it. It is quite labour-intensive in the sense that ... you really have to focus on that part. ... I did speak about our employees, that our employees were important and that they knew what had to be done on the deck and that it was important to hang on to those folks, that they were an important component of what you were trying to do.

So it was a fairly open dialogue in terms of the fact that there were leaks there.<sup>47</sup>

Mr. Kennealy admits effectively telling Mr. Nazarian that the leaks could be controlled by proper maintenance. In fact, this was not so, and Mr. Kennealy knew it because of the 1999 Halsall report and because the leaks continued to be a significant problem right up until the date the property was transferred to Eastwood. As just one example, I cite the meeting of June 15, 2005, described below. Even if Mr. Kennealy's evidence is accurate, he misled Mr. Nazarian. As I will explain, similar misleading information was provided to the firm Construction Control when it conducted its inspection of the Mall on behalf of the Royal Bank of Canada (RBC), Mr. Nazarian's lender.<sup>48</sup>

Mr. Kennealy did testify that Retirement Living did not provide the Halsall or Nicholls Yallowega Bélanger reports to Bob Nazarian, but he said that Mr. Nazarian never asked for them. He explained that Ms. Guertin, in the course of dealing with the Royal Bank, advised it that they had those reports, but the bank told her it wanted to do its own assessment. Ms. Guertin's evidence supported this version of events.<sup>49</sup> Mr. Kennealy claimed that he had advised Ms. Guertin to move things along and to give Mr. Nazarian and the Royal Bank whatever they wanted.<sup>50</sup> Ms. Guertin testified that she supplied the bank with an environmental assessment that a tenant had done because it was recent, but otherwise the bank ordered its own assessments.<sup>51</sup>

Mr. Kennealy admitted, however, that he did not advise Bob Nazarian of the estimates of \$433,000 and \$700,000 for concrete restoration and waterproofing repairs to the roof; he did tell him that they had a maintenance program and that they had “folks” come look at the roof when they purchased it.<sup>52</sup>

Mr. Kennealy testified:

Q. Did you tell him that you had engineers who had looked at it before?

A. I believe we told him we did have folks come in and look at it, yes.

Q. Did you tell him that your engineers made two recommendations but you didn't perform the work in accordance with those recommendations?

A. We told him that we had the folks come in and look at what sort of the general options were and that we had elected to go with the maintenance option. That is what we would have told him.<sup>53</sup>

Ms. Guertin also claimed that Bob Nazarian was aware of the leaking problem:

It was something that came up in discussion probably several times.

I know Mr. Kennealy talked to him. I was there during some discussions. I recall it being explained to him how key it was to have the employees still work for Mr. Nazarian because they had been working on the deck for years and they understood it and they know how to use the ... material.<sup>54</sup>

Ms. Guertin thought the roof was in “fairly good condition” at the time of the sale, with the exception of the Library. She did not know whether Bob Nazarian visited the Library during his several trips to Elliot Lake, but assumed he did. She testified, however, that Mr. Nazarian never raised the issue of the Library.<sup>55</sup> When asked whether there were any discussions with Mr. Nazarian about what was recommended in the Halsall report, Ms. Guertin testified that she recalled Mr. Kennealy talking to Mr. Nazarian about joint profiles, routing, and sealing, and explaining to him how it worked.<sup>56</sup> The evidence of Bob Nazarian's future lawyer, Antoine-René Fabris, a local of Elliot Lake, also differed slightly. Indeed, Mr. Fabris testified that Mr. Nazarian told him he had not been made aware of the “extent” of the leaks when he bought the Mall; he knew there were some minor leaks, but not the extent to which the roof was actually leaking.<sup>57</sup> Although the issue of whether Bob Nazarian was aware of the leaks when he bought the Mall may be up for debate, one thing is certain: Retirement Living did not provide him with the engineering reports it had in its possession.

## **Bob Nazarian did not hire his own engineer and relied on the assessment by the Royal Bank's engineer**

Bob Nazarian did not hire his own independent inspector to inspect the Mall, as was his right under the agreement of purchase and sale. Instead, he relied on the inspection by the engineer hired by the Royal Bank before it agreed to lend the purchase money. He did not see the report from the bank's inspectors before the transaction closed because, as he testified, he did not need it. In his view, if RBC accepted the mortgage after having done an inspection, it indicated that everything was to the bank's satisfaction, which was sufficient for him.<sup>58</sup> In any event, Mr. Nazarian was happy with the deal: “It was a steal.”<sup>59</sup> The brochure given to him by NorDev showed a net income of \$825,000. His offer of \$8,200,000 represented a 10 percent return on investment, which was, according to Mr. Nazarian, a very good deal.<sup>60</sup> Having come to that conclusion, Mr. Nazarian decided that he did not need to have the property inspected. Not hiring his own inspector had been his practice with previous purchases, and he testified that was the way he always proceeded.<sup>61</sup> He would surely come to rue the day he continued to adhere to that practice.



## April–August 2005: During the due diligence period, the Library continued to leak, but the City provided no assistance

While Retirement Living was inching closer to a deal with Bob Nazarian for the sale of the Mall, some tenants continued to suffer from leaks, including the Library and Scotiabank. In the spring of 2005, the conditions at the Library became unbearable for the staff. On Thursday morning, April 21, 2005, Barbara Fazekas, chief librarian, sent an email to Judy Menzies, who was then chair of the Library board, describing the water damage that the Library was experiencing:

Even though it rained only slightly on Tuesday night/early Wednesday morning, there was water leaking in the Library yesterday morning in the bathroom, tech office and storage room. Some of the ceiling gunk fell on the plastic covering which we placed over the bookshelves when we came in. As one row had three buckets in it, I cordoned the row off from patron access. Barbara [a librarian] and I ended up cleaning the bathroom floor at 11 a.m. (after my meeting with Dan [Gagnon]) as NORDEV had still not sent anyone to clean it up and I was worried about staff safety even though Barbara had requested assistance in person in front of both a maintenance staff member and Rhona [Guertin] who merely rolled her eyes as though we were infringing on her day!

Troy [Speck] is suggesting that we write a letter with our concerns as stated on your list. Dan [Gagnon] will let me know whom to send it to: CAO or Mayor, but they don't want NORDEV involved at this point in time. When I hear back from him, I will contact you with the details. If you want help with the letter, I am quite willing.

In the meantime, I am to contact Ralph Reagan from the Ministry of Labour to have the air quality tested again. The information gathered would be a supporting argument for the City to use in negotiation. Sue's [Morin] doctor told her this week that her present respiratory ailment may be due to mould and she says that she doesn't have any in her house. Pat [McGurk] has been experiencing burning in her eyes recently to the extent that she is wearing glasses instead of her contacts.

...

Sorry about all this bad news; however, I want you to know how things are developing. On May 2nd, the Mayor and Council had scheduled a caucus meeting in the Committee Room when we wanted to meet so I suggested that we might appear as a delegation to that meeting.<sup>62</sup>

Although she did not deal with Ms. Guertin often, Ms. Fazekas testified that, during this incident, Ms. Guertin was not receptive to her concerns.<sup>63</sup> Ms. Fazekas indicated that she did not know why Mr. Speck, Elliot Lake's chief administrative officer, did not want NorDev involved at that time.<sup>64</sup> She expected Mr. Speck and Mr. Gagnon, the City's director of project tourism and leisure, to work with the landlord to fix the roof situation and stop the leaks.<sup>65</sup> Ms. Fazekas did contact Ralph Regan of the Ministry of Labour, and he went to the Library on May 3, 2005.<sup>66</sup>

Mr. Speck testified that he remembered this leaking incident,<sup>67</sup> but he did not recall telling Library staff not to involve NorDev. He testified that he had spoken with Ms. Fazekas after the incident and told her to gather all the documents regarding leaks, have the Ministry of Labour perform air-quality testing to assess for mould, and establish the cost to repair the damage. He stated that the intent behind his advice to Ms. Fazekas to compile information on the leaks and air quality was to have the information to hand over to the landlord and to ensure that it would not ignore their request.<sup>68</sup>

Mr. Speck agreed that Ms. Fazekas held the position of chief executive officer of the Library and that, although she asked Mr. Speck to help her with the situation, he had no authority over the Library or its operation.<sup>69</sup> Mr. Speck testified at first that he was not sure why Ms. Fazekas approached him regarding the issue at the Library,<sup>70</sup> but later agreed that Ms. Fazekas sought the City's help to solve the problem and that it was within the City's power, not the Library board's, to arrange for a new lease in another facility.<sup>71</sup>

On the morning of April 27, 2005, Ms. Fazekas sent an email to the Library board members describing the staff's frustration and listing the issues confronting the Library. The public was also urged to send complaints to the Library board, the landlord, and their City councillor.<sup>72</sup> At the same time, Suzanne Morin, a librarian, sent an email to Andrea Leddy, the City's human resources manager, copied to Ms. Fazekas, in which she asked how to file a health and safety complaint concerning the condition of the Library. In her email, Ms. Morin stated:

Just this morning we have closed off half of the fiction area to the public and staff because of the water leaks from the roof. We had so many buckets in the aisles that we felt it was an accident waiting to happen. Many ceiling tiles were either removed or got so wet from the leaks that they have collapsed. Water pools into the light fixtures. Our staff office is also affected with leaks and some ceiling tiles have also been removed. Our staff washroom is also affected, tiles have been removed and twice in two weeks the bathroom floor was flooded with water. I was off work sick two days last week because of respiratory problems due to possible mold or mildew in the ceiling. I have noticed in the three years that I have been working here that I am always plagued with either headaches, respiratory problems, coughs, itchy eyes and throat, etc.<sup>73</sup>

Later that morning, Ms. Fazekas forwarded Ms. Morin's email to the members of the Library board.

At 10:50 a.m., Ms. Morin sent another email to members of City Council, including Mr. Hamilton, a councillor at the time, entitled "Health and safety concerns re. Library," in which she expressed the same concerns – this time not only as an employee of the Library but also as a taxpayer.<sup>74</sup> Ms. Morin also invited the recipients of

the email to view the deplorable conditions (see fig. 1.7.1).

Chris Clouthier, building inspector and property standards officer, and Syl Allard, chief building official, testified that they did not see this email at the time. Mr. Allard testified that, if this email had been directed or copied to the City's Building Department, as it should have been,<sup>75</sup> he would have considered it a complaint and acted on it. Mr. Allard agreed that, if what Ms. Morin was saying was true, it would clearly be a breach of the watertightness provisions of the Property Standards By-law.<sup>76</sup>

Mr. Farkouh, who was the mayor at the time, testified that he could not recall receiving Ms. Morin's email.<sup>77</sup> Mr. Hamilton testified that he did not accept Ms. Morin's invitation to view the conditions at the Library because he believed the matter was being taken care of by the Library board as well as City staff. He admitted that he did not take any steps to deal with the issue of leaks at the Library even though the working conditions described were not acceptable, particularly in a building to which the public had access.<sup>78</sup>

I must admit being mystified when Mr. Hamilton initially testified that the email was not a complaint of a building not being watertight, contrary to the Property Standards By-law, because it was, according to him, a health and safety complaint. He held this view even though he agreed that (1) Ms. Morin was writing as both an employee of the Library and a taxpayer; and (2) it is council's role to deal with



**Figure 1.7.1 Conditions in the Library, April 2005**

Source Exhibit 2041

property standards issues in the municipality. When the question was put to him again, however, Mr. Hamilton agreed that, in hindsight, it was a complaint under the by-law. He ultimately agreed that it could not have been seen as anything else.<sup>79</sup> He did nothing, however, to see that it was dealt with as a complaint under the Property Standards By-law.<sup>80</sup>

Don Denley, another councillor, also received Ms. Morin's email. Mr. Denley witnessed the situation in the Library and spoke to Ms. Morin about her health issues.<sup>81</sup> However, no member of council, or council as a whole, ever reported the leaks to a property standards officer or to the Building Department.<sup>82</sup>

Later, that same day, Councillor Cathy McTaggart forwarded Ms. Fazekas's email (which attached Ms. Morin's first email) to City Council as well as to Lesley Sprague, the City clerk, and to Mr. Speck. In her email, Ms. McTaggart advised that she felt this issue was something that must be dealt with at their next caucus meeting.<sup>83</sup>

Mr. Allard testified that he did not receive this email and that Ms. Sprague, his immediate superior, did not speak to him about the situation. Mr. Allard did not recall any discussion with Ms. Sprague about the leaks at the Mall.<sup>84</sup> Ms. Sprague, for her part, testified that she did not inform the Building Department about the situation at the Library or do anything as a result of the receipt of this email. She claimed that it was not her responsibility to do anything because the people who were advised, the human resources manager and chief administrative officer, were those who needed to know.<sup>85</sup>

In response to Councillor McTaggart's email, Mr. Speck responded that he was "not sure why it now seems to have become an issue requiring Council involvement" and advised that Mr. Gagnon had met with the Library board the previous week and had discussed the issues about the leaks.<sup>86</sup>

Having received no support since moving into the Mall, it is evident that the chief librarian felt that she had no choice but to reach out to various individuals in the hope that someone, anyone, would help. Unfortunately, as I describe below, this help never materialized until the arrival of Tom Derreck as chief administrative officer in the fall of 2006.

On April 28, 2005, Ms. Fazekas wrote to Mr. Speck in response to his email of the previous day and asked him whether she should write the letter to him or to council. Mr. Speck responded to Ms. Fazekas as follows:

You are the manager of that facility. I am the manager of the City. surely [sic] to God we can deal with this, or we shouldn't have our jobs. Why would you send it to Council? Please get me the letter ASAP.<sup>87</sup>

Ms. Fazekas felt that Mr. Speck's reaction was "pretty adversarial." She testified that she believed it was her duty to keep the City aware of the situation at the Library, because it was the funder. She explained that the Library "had limited options to do more than make the landlord and the City aware of the conditions that we were working in." She expected that the City would assist the Library in working with the landlord to improve the roof and the leak problems.<sup>88</sup> Mr. Speck testified that he was still "frustrated" when he sent that email, because he felt that instead of getting answers to the questions he had asked of Ms. Fazekas, he was getting further complaints.<sup>89</sup>

When asked about these communications, Mr. Farkouh agreed it was inappropriate for Mr. Speck to have told Ms. Fazekas what she could and could not take to council. He claimed that, to his knowledge, no explicit or implicit direction had been given to Mr. Speck to keep issues relating to the Library away from council.<sup>90</sup>

Mr. Allard testified that he did not receive any of these emails at any time in 2005 and that no one made him aware of the content of them. Mr. Allard agreed that these emails appeared to have been sent to the highest levels of the municipal organization, but he could not provide any explanation why nobody had ever discussed the emails with him, the chief building official.<sup>91</sup>



On April 28, 2005, Ms. Menzies sent a letter to Mr. Speck (as he had requested) describing the history of the problems at the Library as a result of the roof leaks. She described how buckets were placed under the leaks – often with several large garbage pails sitting on the floor collecting water, and plastic covering the books. She also described the poor staff working conditions. She concluded her letter by saying that she believed they needed to start making plans for a new location.<sup>92</sup> The Library wanted to move out of the Mall and was seeking the help of the City.<sup>93</sup>

**... Ms. Menzies ... described how buckets were placed under the leaks – often with several large garbage pails sitting on the floor collecting water, and plastic covering the books. She also described the poor staff working conditions. She concluded her letter by saying that she believed they needed to start making plans for a new location. The Library wanted to move out of the Mall and was seeking the help of the City.**

Both Mr. Allard and Mr. Clouthier testified that they did not see this letter and that, had the letter been sent to them, they would have acted on it.<sup>94</sup> When asked about the letter, Mr. Hamilton testified that he was not aware of the extent of the leak-related issues the Library had suffered for several years, but agreed that he knew that the leaks had persisted for a number of years (as he had been told in the email from Ms. Morin on April 27, 2005). When asked whether this letter constituted a complaint of a building not being watertight, Mr. Hamilton claimed that it was a health and safety issue, given the title of the letter. He explained that, if Mr. Speck had seen a need to do so, he would have expected him to refer the letter to the chief building official for investigation under the Property Standards By-law. Mr. Hamilton agreed that the policy was that, if a complaint came in about a building being in breach of the Property Standards By-law, the expectation was that it would be referred to the chief building official and that, once a complaint was referred to him, he was obliged to conduct some sort of investigation. Mr. Hamilton eventually admitted, after further questioning, that he would have expected Mr. Speck to refer the matter to the chief building official. Mr. Hamilton was not able to

explain why this letter would not, as a matter of course, have been sent to the chief building official by Mr. Speck. He agreed that there was no requirement that a complaint be in any particular form.<sup>95</sup>

On May 2, 2005, Mr. Speck emailed Ms. Fazekas to ask her for an update on the deficiencies – which she was to outline. Ms. Fazekas replied that Chemnorth (Quest Enterprises) had taken samples for testing<sup>96</sup> and that the Ministry of Labour was going to do the same. She also advised him that the landlord was aware of the work being conducted by Chemnorth's representative, Bob Stirling, and had told him to do "whatever it takes." She informed Mr. Speck that she would forward the findings to the Health and Safety Committee and to him.<sup>97</sup>

Mr. Speck replied: "I understand forwarding the information to the Health & Safety Committee, but I trust you are not expecting them to address the situation."<sup>98</sup> Mr. Speck testified that he was not insinuating that the committee could not address the issues. His intentions were to let Ms. Fazekas know that she, not the committee, had to deal with the contractors and the remediation.<sup>99</sup> Mr. Speck agreed that it is the committee's role to receive complaints and recommend fixes.<sup>100</sup>

It appears that no caucus or council meeting was held on May 2, 2005. Ms. Fazekas's request to Mr. Speck that the Library send a delegation to council to discuss the issues on that day, as described in her email of April 21, 2005, was unsuccessful.<sup>101</sup>

## May: The Ministry of Labour and Quest Enterprises find mould in the Library

On May 3, 2005, Ralph Regan and Tony Fontana from the Ministry of Labour inspected the Library. Air quality tests were conducted.<sup>102</sup> Mr. Fontana's report, issued on May 10, 2005, noted the presence of mould in the ceiling tiles, carpet, and drywall. Mr. Gagnon informed Mr. Speck of these test results.<sup>103</sup> Mr. Fontana made the following recommendation:

The most effective way to manage mould is to prevent the conditions that promote its growth in the first place. *Sources of water infiltration should ideally be identified and eliminated.* When water infiltration does occur, it should be removed in a timely manner.<sup>104</sup> [Emphasis added.]

Not only did Mr. Regan recognize that these results were not “good,” but he also agreed that the 1995 report, previously discussed, and the 2005 report essentially had the same recommendation and therefore there was no basis on which he could have concluded that the situation had improved between 1995 and 2005.<sup>105</sup> Mr. Regan did not issue any orders as a result of this visit and the tests conducted, and he would retire from the Ministry of Labour shortly thereafter.<sup>106</sup>

## May 2005: Again the City did not act

On May 6, 2005, Mr. Speck responded to Ms. Menzies's letter of April 4<sup>107</sup> (copied to Mayor Farkouh and Councillor McTaggart), telling her that he shared her concerns and suggesting that they should be thinking about the future of the Library. Mr. Speck then set out options for future locations for the Library, including continuing to stay in the Mall. He concluded his letter by suggesting that a meeting could be set up between the Library board, the Library's council representative, the mayor, and himself to discuss some of these notions. This meeting never took place.<sup>108</sup>

Mr. Farkouh testified that Mr. Speck consulted him before sending this letter. Mr. Speck informed Mr. Farkouh that the situation in the Library was affecting the health and safety of the staff and members of the public and that he was now more engaged with it. Mr. Farkouh testified that he told Mr. Speck to keep him informed because he was “at this point concerned and wanting to see what could be done to rectify this problem.”<sup>109</sup>

Despite recognizing the importance of the health and safety issues and the possible legal liability to the municipality resulting from the leaks,<sup>110</sup> Mr. Speck failed to help the Library. He agreed that it was within the City's power to look at new locations, exert influence over Retirement Living as the landlord to fix the leaks, or help the Library by asking the chief building official to inspect the Mall and issue an order if appropriate.<sup>111</sup> But the City took none of these actions. Once again, the Library's request for a more “aggressive campaign against the landlord rather than bandaaid solutions”<sup>112</sup> fell on deaf ears. The City simply suggested to the Library that it remedy the damage resulting from the leaks by washing the walls, having air and dust samples tested, cleaning the carpets, and determining the cost to purchase a HEPA (air purifying) machine.<sup>113</sup> These actions, which were all taken,<sup>114</sup> did nothing to stop the real problem – the leaks.

**Once again, the Library's request for a more “aggressive campaign against the landlord rather than bandaaid solutions” fell on deaf ears.**

## **May 2005: The City's Joint Health and Safety Committee recommended fixing the roof leakage problem – to no avail**

On May 12, 2005, the Joint Health and Safety Committee of the City of Elliot Lake discussed the Library situation, including the positive test results for mould in the carpet and drywall. The committee made several recommendations, including: "Ensure the landlord has the problem of roof leakage fixed to eliminate the hazardous conditions that occur when it rains"<sup>115</sup> – a result the Library had tried to achieve since 1989.<sup>116</sup>

Mr. Speck testified that, following this recommendation, he organized a meeting with the mayor, Mr. Kennealy, Ms. Fazekas, and members of the Library board so the Library could voice its concerns to the landlord.<sup>117</sup>

Mr. Farkouh testified that he was not specifically advised that the committee had made this recommendation. By this time, he knew that the Library had been and was continuing to ask the landlord to fix the leaks.<sup>118</sup> He agreed he was on the board of Retirement Living (the landlord), as the representative of the City, but he did not take any specific steps to get Retirement Living to fix the leaks.<sup>119</sup>

Almost a month later, on May 16, 2005, the Library was still experiencing leaks.<sup>120</sup> Once again, although those at the highest levels of the City were aware of this situation,<sup>121</sup> the Building Department was not officially informed.<sup>122</sup> The problem had become so severe that the Joint Health and Safety Committee<sup>123</sup> had recommended that the Library put in place a procedure to deal with the leaks, which it did. A 16-step procedure was instituted for the Library staff, including checking for leaks every morning and, if leaks were found, putting tarps over books and computers, calling maintenance, doing clean-up, and putting down buckets.<sup>124</sup> None of these steps were tasks that librarians would normally have to deal with. Nor should they have had to.

The Library also developed a binder to record when maintenance staff was notified, the maintenance staff's response time, and the action taken.<sup>125</sup> When asked whether anyone at the City offices was informed when leaks took place, Ms. Fazekas explained:

Well, it was so often, I mean, who would we report to? And based on past experience with the lack of action taken by the City, it just grew really frustrating ... – there wasn't any point in reporting every incident.<sup>126</sup>

It is understandable, though unfortunate, that this procedure did not involve notifying anyone from the City. The Library's complaints to the City had consistently fallen on deaf ears.

## **Conclusion about the City's attitude: the City did not want to cause trouble for the Mall**

It is clear to me that, contrary to Mr. Farkouh's evidence, there was at least an implicit understanding on the part of City staff and City Council that the Mall was not to be interfered with. As I explain below, even Mr. Allard recognized this political reality. The failure of anyone – the mayor, City councillors, Mr. Speck, Ms. Sprague – to forward these emails, letters, reports, and complaints to Mr. Allard is, at a minimum, circumstantial evidence that such an understanding existed.

Mr. Speck's behaviour throughout this exchange, however, went further than a failure to act because of an implicit understanding. He wrote to Ms. Fazekas and told her not to contact NorDev about the situation at the Library, wrote to Councillor McTaggart and Ms. Fazekas admonishing them both that it was not appropriate to go to council about the situation, and wrote to Ms. Fazekas telling her that she should not expect the Joint Health and Safety Committee to deal with the issue. These were explicit directions from the City's most senior staff person warning against taking action about the leaks.



### **Retirement Living was concerned that the Library would become a problem**

On May 26, 2005 – just over a month after the agreement of purchase and sale, but while Eastwood could still back out of the agreement because of conditions contained in it – Mr. Kennealy reported to the board of directors of Retirement Living and NorDev. He wrote, under the heading “Library Problem”:

Given the recent newspaper article and several discussions I have had with various individuals, I anticipate some difficulties with this tenant. I believe this problem will be solved and I will provide an update during our meeting.<sup>127</sup>

Mr. Kennealy testified that this reference related to the leaks suffered by the Library.<sup>128</sup> He claimed he would have discussed this matter with Richard Quinn, Retirement Living’s property manager, and Ms. Guertin.<sup>129</sup> Mr. Quinn, however, testified that he did not know what this issue was about.<sup>130</sup> Mr. Kennealy said that he wrote that the problem would soon be solved because he believed that NorDev “were going to do everything in our power to try and resolve the problem for them and see if we could do anything to get them in a position where they were content.”<sup>131</sup> Both Mr. Hamilton and Mr. Farkouh, the City representative on the board, were absent from the meeting. They both testified that they did not seek more information from Mr. Kennealy about this issue.<sup>132</sup>

In fact, Retirement Living, which was about to divest itself of the Mall, did nothing to fix the leaks. Quite the contrary, as I will explain, it advised the Library that it was not prepared to invest the necessary funds in fixing the roof.

### **June 2005: M.R. Wright and Associates was aware that there was water infiltration in the Mall**

As will be seen, the Sault Ste. Marie engineering firm of M.R. Wright and Associates played an important role in assessing the Mall’s condition in 2009 and 2012. Its involvement, however, began much earlier. As part of the remedial steps taken by the Library in the spring of 2005 to deal with the leaks, Mr. Stirling retained that firm to conduct an assessment. M.R. Wright concluded that the remediation activities undertaken by the Library had restored it to normal conditions (i.e., no more mould). Ms. Fazekas gave the report to Ms. Leddy, Mr. Gagnon, and Mr. Kennealy.<sup>133</sup> It noted that the incidents of water intrusion had been problematic since the establishment of the Library in the Mall 16 years before. Although no further action was required with respect to remediation, M.R. Wright concluded:

[H]owever, water damage and staining observed during the course of this assignment does suggest that water intrusion continues to be problematic. Therefore, events of roof leaks that periodically occur as a result of the existence of a problematic overhead exterior parking lot must be resolved in order to limit the potential for mould proliferation.<sup>134</sup>

### **June: Retirement Living is not prepared to fix leaks since it was about to sell the Mall**

On June 1, 2005, Mr. Speck sent a letter to Mr. Kennealy in which he outlined several ongoing problems that the Library had experienced as a result of the leaks.<sup>135</sup> He said:

As you know, the Elliot Lake Library has been experiencing ongoing problems with severe leaks from the roof *since it relocated to the Algo Mall in the early 1990s*. Until recently, the problem with the leaks was thought to be largely the damage to the books, the inability to use certain areas of library while the water was dried out and the staff time involved in the clean-up. While those inconveniences and difficulties continue and must be addressed, a larger issue has arisen that required our immediate attention as an employer and manager of the public facility.

A staff member at the library raised a concern that her health was impacted by the atmosphere in the library caused by the frequent flooding. An investigation was launched by our Health and Safety Committee. The investigation included various tests of the working environment. The drywall, carpet, ceiling tiles, some of the books and air quality were tested for mould and other contaminants. Those results that are available at this time are attached. One severe health hazard and some safety hazards were discovered.

Abundant mould growth was discovered in the drywall in the office where frequent flooding had occurred. Some mould was also discovered in the carpet, and very sparse mould on some of the books in the collection. Detailed air quality test results have yet to be received but, since our telephone conversation of May 30, 2005, the verbal report from the firm doing the tests has indicated that no mould spores were discovered in the air. Mould can cause respiratory problems, especially for those with compromised immune systems such as the elderly or those with allergies. The presence of mould poses a health risk to our employees and the general public.

Safety hazards occur whenever the floods are severe enough to cause the ceiling tiles to cave in and/or soak through and risk falling on the public or employees. Risk of falls occur when the floors and office equipment become wet from the flooding. Other potential risks exist and are being assessed, such as corrosion of electrical fixtures from the water damage, the state of the heating and ventilation systems and trip hazards caused by roping off the water damaged areas when the library opens.

In addition to the health and safety hazards, the library administration is severely impacted by the frequent floods, since significant staff time is spent cleaning books and shelves, closing the fiction section to the public during the clean-up and causing public concern and negative publicity for the library and the mall. Books are frequently damaged, some beyond repair and cannot be replaced.

Given the test results, the library has rented an air scrubber, a large HEPA filter that filters the air for mould or other contaminants like dust and particles of ceiling tiles. Quest Enterprises was contracted to clean the carpets, wash down walls and oversee the testing and drywall replacement. The carpets were cleaned and should be cleaned frequently in the future to ensure that future mould growth will not take hold. The drywall where the mould had grown was removed and replaced.

Richard, all these problems are clearly caused by the roof leaks and unless something can be done will only continue in the future. We would like to meet to discuss the problem and review the feasibility of resolving the roof leaks as soon as possible. Our main interests include: 1) Ensuring the library environment is safe for occupation and use by staff and members of the public; 2) Eliminating damage to municipal property; and 3) Avoiding restrictions on and interruptions to library services.<sup>136</sup> [Emphasis added.]

Mr. Clouthier and Mr. Allard were not advised of this letter. Mr. Clouthier testified that Mr. Speck never advised him during his tenure about leaks in the Library or asked him to inspect the Library. Mr. Clouthier confirmed that the leaks in the roof, as described by Mr. Speck in his letter, more specifically the reference to “severe” leaks that had been happening since the 1990s, was a violation of the watertightness provision of the Property Standards By-law.<sup>137</sup> Similarly, Mr. Allard testified that had he received this letter, combined with the April 27, 2005, complaint of the Library, he would have taken action under the Property Standards By-law.<sup>138</sup>

Five days later, on June 6, 2005, a council caucus meeting was held where the “Status of Library issue” was listed as an item for discussion.<sup>139</sup> Mr. Farkouh did not know what was specifically discussed but thought that it might have been the issues raised by Councillor McTaggart and Mr. Speck with respect to the leaks at the Library.<sup>140</sup> Since this was a secret caucus meeting, there was no record of what was said.<sup>141</sup> On June 10, 2005, Ms. Menzies responded to Mr. Speck’s letter of May 6, 2005, and requested that the Library board meet directly with City Council.<sup>142</sup> Ms. Fazekas testified that the board members felt they should deal directly with council because they were appointed by council, and they expected, understandably so, council to “[i]mprove the situation.”<sup>143</sup> No such meeting took place.

## June: A suspicious Bob Nazarian reduces the purchase price to \$7.2 million

In early June 2005, in a letter sent by his real estate agent, Mr. Sobhi, Bob Nazarian asked that the purchase price for the Mall be reduced to \$7.2 million in exchange for the removal of all the conditions except the financing condition. Mr. Sobhi indicated in the letter that Mr. Nazarian intended “to improve the condition of the property and the parking lot in due time.”<sup>144</sup>

Bob Nazarian testified that the price reduction was done at his behest. He indicated that his action was a result of the “secretive” nature of the deal and the fact that it was being sold “[a]s is, where is [sic].” Although he had not noticed the “as is” clause before signing it, Mr. Nazarian testified he noticed it after receiving no documentation from NorDev. At that point, he thought there might be something they did not want him to know, so he went through the contract and noticed the clause. He agreed this clause was a bit of a “red flag,” but instead of getting out of the deal, as was his right, he lowered the price.<sup>145</sup> Mr. Nazarian testified that the improvements referred to in Mr. Sobhi’s letter referred to the ground level parking lot between the Mall and Ontario Street, not the rooftop parking.<sup>146</sup>

**Mr. Nazarian was surprised by NorDev’s quick acceptance of the price reduction. He testified that it made him think that NorDev was hiding something, but he did not ask any more questions because he had already asked Mr. Kennealy and Ms. Guertin several times if there was anything more he needed to know about the Mall.**

On June 10, 2005, NorDev accepted the proposal to reduce the price to \$7.2 million immediately, without asking any questions.<sup>147</sup> Mr. Kennealy testified that he felt it was appropriate given that Bob Nazarian wanted to do some improvements to the property.<sup>148</sup> Mr. Nazarian was surprised by NorDev’s quick acceptance of the price reduction. He testified that it made him think that NorDev was hiding something, but he did not ask any more questions because he had already asked Mr. Kennealy and Ms. Guertin several times if there was anything more he needed to know about the Mall.<sup>149</sup>

At the request of Mr. Kennealy, on June 10, 2005, Mayor Farkouh sent a letter to Bob Nazarian<sup>150</sup> advising him that the Mall was “a good investment.” Mr. Nazarian testified that he had met with Mayor Farkouh before purchasing the Mall to ask about it and whether there were any problems.<sup>151</sup> According to Mr. Farkouh, Mr. Nazarian wanted

some comfort, since he’s making a significant investment in Elliot Lake, that somehow, once he makes the purchase, something is not going to pop up and, in effect, cause harm to his investment in the form of some new mall ... that would be competing with it.”<sup>152</sup>

Mr. Farkouh was happy to provide the letter because he saw the sale as a good thing: this purchase would be the first major investment in Elliot Lake since the 1990 mine closures and the elimination of some 9,000 jobs. When he spoke to Mr. Kennealy about this letter, Mr. Farkouh testified that the subject of the Library leaks did not come up.<sup>153</sup>

Mr. Nazarian perceived the letter from Mayor Farkouh as a “blessing.” At the time, Mr. Nazarian did not know that NorDev and Retirement Living were companies organized with the assistance or support of the City of Elliot Lake. He did not know that Mr. Farkouh sat on the board of Retirement Living.<sup>154</sup>



## June: Retirement Living is not prepared to spend \$1.5 million to fix the roof

On June 15, 2005, two months after the Library's complaint, a meeting was held between Mr. Kennealy, Mr. Speck, Mayor Farkouh, Ms. Menzies, and Ms. Fazekas, as well as other members of the Library board. This meeting took place just two weeks after Mr. Speck's lengthy letter to Mr. Kennealy complaining of the serious problems with leaks at the Library and a few days after all the conditions of the sale to Eastwood, except financing, had been waived.<sup>155</sup> Ms. Fazekas's contemporaneous report of the meeting, which I accept as accurate, indicated the following:

Mr. Kennealy chaired the meeting.

Having distributed copies of the lease to the Board members the previous day, he stressed the importance of written communication with the landlord in the future, especially prior to any action being taken in the way of maintenance repairs. He also drew attention to Clause 6 on page 13 of the lease that protects the landlord against claims from the tenants regarding compensation for water damage to their property.

*He outlined the structural challenges faced by the flat roof of the mall and the attempts at ameliorating the problem over the past 5 years. The structure of the parking roof is two layers of cement slabs approximately 4 to 5 feet apart. Solutions proffered by the experts include the insertion of a rubber membrane between the two layers, involving the removal of the top cement layer or the construction of a structure over the roof that would necessitate increased structural support. This latter option would cost approximately \$1.5 million.*

The preferred option is to find a substance that seals the leaks. This has been done in the more passive areas; however, in the areas of higher traffic in the line between the two access ramps, the seals can not [sic] be kept intact what with the temperature changes, cars and snowplows, etc.

A solution which will be investigated this summer is the insertion of a trough wider than the I beam (along which the water flows to leak below, i.e. the seam where historically most of the leaks have occurred) to catch the water and drain it to an outside spot. A speed bump may be added over this trough to slow down the traffic over it.

The Board members inquired about an alternate location in the mall for the library, e.g. the bingo hall. The landlord was unsure of the area of those premises and could not predict what the vacancy situation may be in 5 years.

The Librarian inquired about different levels of maintenance service available from the Landlord; however, the same service is offered to all tenants.

The Landlord is to meet with the Librarian to discuss HVAC maintenance schedules, access to hot water in the storage area, replacement of existing light fixtures with sealed ones to prevent leaking inside the fixtures and the replacement of plastic covers over the fluorescent lights.<sup>156</sup> [Emphasis added.]

Mr. Speck's notes of the same meeting (which Mr. Kennealy did not contest<sup>157</sup>) included the following:

July-Aug – RK will get engineer in to determine if his solutions are do-able (eavestroughing)

will do:

repair

some work

- will not do large outlays of cash.<sup>158</sup>

Mr. Kennealy testified that he did not recall the meeting.<sup>159</sup> He could not recall saying the excerpt in italics set out above, but did not contest Ms. Fazekas's version.<sup>160</sup> When asked about the source of the \$1.5 million solution, Mr. Kennealy testified that he had no idea where the \$1.5 million figure came from:

I was trying to think through how would I come up with a number like that? I mean, could I pull something like that out of the air? I mean, not uncommon for me. I mean, you know, my entire background is in sales and dealing with that kind of situation. I don't – I honestly do not know where I would come up with the number, Mr. Doody. Like it must have been a collage of NY, of Nicholls Yallowega, of Halsall. I must have been just randomly picking stuff in my mind to come up with something like that.<sup>161</sup>

Mr. Kennealy claimed that, despite the fact that the Mall had for all intents and purposes been sold to Bob Nazarian, he continued running the Mall and dealing with the customers on a long-term basis, including attempting to find a solution that summer to the leaks.<sup>162</sup> I find it very difficult to place any faith in that assertion. Having only a few days prior to this meeting accepted a reduction of \$1 million in the sale price, quickly and without asking questions, it is evident to me that Retirement Living was anxious to sell the Mall as soon as possible. More importantly, there is no evidence that Retirement Living did anything to resolve the leaking problem of the Mall after it accepted Mr. Nazarian's offer in April, other than continuing to maintain it the way it had been maintained since the time it was built. NorDev was determined to sell the Mall and, as Mr. Kennealy is recorded as having said in the meeting, was not prepared to "do large outlays of cash."<sup>163</sup>

Mr. Farkouh agreed that by the end of the meeting no solution had been found to fix the leaks. When asked what he did at that time, Mr. Farkouh testified that he asked Mr. Speck to keep him informed and to ensure the landlord kept his commitment. He did not take any other steps.<sup>164</sup> When asked if he gave any consideration to asking the chief building official to conduct an inspection to determine whether to issue a property standards order, he again stated:

A. As I stated earlier, Mr. Doody, it never occurred to me or any members of Council that the Property Standards by-law would have been the vehicle to implement an order and address this issue.

And that is something that, had I known, had I – it would have been done.

... But at that – at that point in time, I speak for myself and probably the members of Council, that we didn't realize that the Property Standards Committee had that kind of authority and power in it, to effect this.

Q. And if you had known, you would have done something?

A. Yes, I would have.

Q. Even if ... doing something risked closing the mall?

A. Yes, sir.<sup>165</sup>

I note that it does not appear that either Mr. Kennealy or Mr. Farkouh disclosed the fact of the impending sale of the Mall.

Mr. Hamilton testified that he did not know in 2005 that the Library had been suffering long-standing leak problems since it had moved in the Mall. He indicated that

- Mr. Kennealy had never told him, as a member of the board or otherwise, about what he had described at the meeting with the Library in June 2005 as "the structural challenges faced by the flat roof of the Mall";
- Mr. Kennealy never told him, as a member of the board or otherwise, that the expert had suggested putting a membrane on the roof;

- Mr. Kennealy never told him, as a member of the board or otherwise, that the cost of fixing the leaks would be about \$1.5 million;
- Mr. Speck and Mr. Farkouh did not report to council about this June 2005 meeting; and<sup>166</sup>
- Mr. Kennealy never told him or the board that Retirement Living would not make large outlays of cash to fix the leaks.<sup>167</sup>

I am inclined to accept Mr. Hamilton's evidence on this issue. I agree with him that it is alarming this information was not provided to the board of Retirement Living or to members of City Council other than Mayor Farkouh and Mr. Speck.<sup>168</sup> At a minimum, Mr. Speck and Mayor Farkouh should have alerted Mr. Allard so that he could conduct an inspection and issue an appropriate order.

## **Conclusion on 2005 Library situation: the failure of Retirement Living and the City to help was inexcusable**

Ms. Fazekas said it best when she was asked at the end of her examination in chief by Commission counsel whether she had anything else to say:

So much. But basically they were deplorable conditions for anyone to work in, and all we were trying to do was provide a safe environment for the staff and the patrons and maintain the integrity of the collection.<sup>169</sup>

In 2005, aside from what is described above, none of the senior City officials, including Mr. Speck, Mr. Gagnon, and Mr. Allard, did anything to assist the Library.<sup>170</sup> And nor did Retirement Living.

## **June–July: Scotiabank was also suffering from leaks**

On June 21, 2005, Robert Jurmalietis, the Scotiabank branch manager at the time, complained to the head office about the situation at the branch:

In 2003, we replaced all the ceiling tile in the branch, and in the process discovered considerable mould and mildew resident in the ceiling. With the recurring dampness, we suspect the mould has returned. The smell is quite noticeable, to the point clients comment on it as they come in to the branch.<sup>171</sup>

As part of preparing the lease renewal documents, Mr. Jurmalietis requested that the ceiling be inspected and the air quality tested to determine if the mould had indeed returned, and, if so, if it presented a health risk to the staff.<sup>172</sup> Pinchin Environmental Limited was retained by Scotiabank to conduct the indoor air-quality and mould assessment.<sup>173</sup> This was the first of several mould and air quality tests performed for Scotiabank during its time at the Mall.<sup>174</sup> Pinchin became a regular visitor and would later also conduct two building condition assessments there.

Pinchin issued its report on July 28, 2005.<sup>175</sup> It reported an interview conducted with Judy McCulloch, manager of customer service at the branch: "There have been numerous roof leaks in the past years. The landlord changes the ceiling tiles whenever a noticeable stain or damage is present."<sup>176</sup> Pinchin concluded:

Mould growth was identified in the janitor's closet on the drywall wall where the sink is attached. Two bulk samples were collected, which confirm this growth. Drywall was dry, suggesting that there was not a current leak. However, plumbing should be checked and necessary repairs should be completed prior to installation of new finishes.



Ceiling tiles with minor water stains were identified in the branch. Staff indicated that ceiling tile water damage is frequent, which indicates that there may be water infiltration from the parking garage above the branch. No musty odours were detected by Pinchin and no mould growth was identified above the ceiling.<sup>177</sup>

As of June 2005, the Pinchin employees investigating the mould at the Scotiabank were aware of a concern about water leaks at the Mall.<sup>178</sup> On July 19, 2005, Scotiabank removed the mould found in the janitor's closet.<sup>179</sup> This step would be the first of many taken by the bank in an attempt to protect its staff and its patrons. Unfortunately, the situation would never improve, leading the bank to move out of the Mall.

## June: Construction Control did not see any evidence of leaks

Construction Control (now CCI Group) was retained by the Royal Bank to carry out a property condition survey of the Mall before the bank provided a mortgage to Bob Nazarian. The building survey was to include a replacement reserve analysis, setting out the future capital expenditures required, including an evaluation of the "Average Effective Useful Life, the Effective Age and the Remaining Useful life" of each building component, together with a cost estimate to remedy immediate deficiencies.<sup>180</sup>

Brian MacDonald, currently manager of the Building Assessment Department at Construction Control, conducted the survey. He holds a bachelor of technology from Ryerson Polytechnical Institute (as it then was) and has worked for Construction Control for 16 years, primarily in the building assessment group. Prior to his employment with Construction Control, he was employed by a division of SNC Lavalin, where he performed quality control inspections on construction projects. Mr. MacDonald has been in the construction industry for over 30 years. Throughout his testimony, he was not only forthright but visibly upset by the fact that the Mall collapsed and he had seen no sign that led him to conclude there was such a risk. I have no reason to doubt his evidence.

Mr. MacDonald explained that a property condition survey of the type requested by RBC included a visual inspection of the property to identify the major elements of the building. RBC also wanted some cash flow projections or projections for capital repair costs over a 13-year period.<sup>181</sup> He testified that the only difference between a property condition survey carried out at the request of a prospective lender and one done for a property owner is that, in the first, destructive testing cannot be required. Consequently, inspections of the type he carried out are limited to what can be seen without destruction. Mr. MacDonald testified, and his report confirmed, that this practice was normal for inspections of this type.<sup>182</sup>

On June 28, 2005,<sup>183</sup> Mr. MacDonald went to the Mall with Tony Noce, a Construction Control engineer with a mechanical background. Mr. Noce's primary responsibility was to inspect the equipment in the mechanical room. Mr. MacDonald inspected the physical condition of the structure of the Mall.<sup>184</sup> He confirmed that Construction Control was not asked to carry out a parking garage assessment, which is a more focused type of review. A parking garage assessment would be conducted by a structural engineer (who would look at the structural elements, including the steel and the connections), would be more detailed than a building condition survey, and would include destructive testing (such as sampling and coring of the concrete).<sup>185</sup>

Mr. MacDonald's contact person for the property condition survey was Ms. Guertin. He could not recall whether he asked Ms. Guertin for documents relating to the Mall; however, his usual practice was to request documents such as drawings and reports from the persons in control of the building, and he believed he would have asked Ms. Guertin to provide the relevant documents. He testified he did not receive any previous engineering reports

or copies of any structural and architectural drawings. Mr. Kennealy also testified that he had not provided the Royal Bank with the Halsall and Nichols Yallowega Bélanger reports.<sup>186</sup> Mr. MacDonald confirmed that a copy of the Trow and Halsall reports would have been helpful to his inspection because he would then have been aware of the history of leakage, and that would have changed his recommendations on how to address the leaking.<sup>187</sup> I conclude that Mr. MacDonald was not provided with any prior reports or drawings and that it is probable he asked Ms. Guertin for them.

He testified that he was never told that the Mall had been leaking for close to 25 years. When he arrived at the Mall, he was accompanied by a maintenance worker (whose name he could not recall) and was taken up to the parking deck, where he noted that repair work had been performed and was ongoing. He testified that the maintenance worker further advised him that the repair program involved sealing the cracks, sealing the control joints, and applying a sealer.<sup>188</sup> The maintenance worker also informed Mr. MacDonald “that the parking surface consists of a concrete topping that is installed over the precast concrete roof slabs and that a waterproofing membrane is not located below the topping.”<sup>189</sup>

Mr. MacDonald’s inspection of the Mall was done in one day over approximately five to seven hours, which was typical for the type of inspection the company had been retained to perform.<sup>190</sup> All the observations on the condition of the building were made from the ground or floor level. No ladder was used during the inspection.<sup>191</sup> He testified that during the course of his inspection he did not recall speaking with any of the tenants in the Mall. He felt that the retainer with RBC, which included a confidentiality clause,<sup>192</sup> restricted him from questioning the tenants about conditions in the Mall.<sup>193</sup> If that is so, it was an unfortunate restriction on Mr. MacDonald’s work, particularly in light of the fact that there were no signs of continuing leaking when he inspected the Mall that dry summer day.

Somewhat surprisingly, Mr. MacDonald explained that lifting or removing acoustical ceiling tiles would be considered destructive testing, not permitted for this report, because in some cases the suspended ceiling is part of the fire separation, and the tiles are held in place by a clip. If Mr. MacDonald had pushed on the ceiling tile, it could break the clip, preventing him from putting the tile back in place and thereby compromising the fire protection of the structure. There could also be hazardous material above the ceiling.<sup>194</sup> The description of the construction of the building in his report was therefore based exclusively on the exposed areas of the Mall. In the basement below the Hotel, some of the ceiling tiles had been removed, enabling him to see the fireproofing, and it was intact. Of course, leakage was not to be expected below the Hotel. No other areas in the Mall had ceiling tiles removed during his inspection.<sup>195</sup>

On July 6, 2005, Mr. MacDonald provided a report to RBC on behalf of Construction Control, but a copy was not delivered to Eastwood.<sup>196</sup> In his report, he noted corrosion at the walkways and canopies at the exterior of the Mall. He testified that he did not have any concerns, safety or otherwise, in relation to the condition of the exterior steel given that the beam itself did not appear to be compromised.<sup>197</sup> He recommended repairs to the corroded areas of the steel framing at the soffit of the suspended walkways, to be done under the supervision of a professional engineer because these were structural repairs and not something that could be completed by maintenance staff.<sup>198</sup>

Mr. MacDonald confirmed in his report that no evidence of water leakage was seen on the interior of the Mall:

Evidence of water leakage at the interior of the building (in the form of water damaged ceiling finishes) was not observed during our site visit, although we understand that water leakage has occurred in the past. In the event of water leakage, repairs are carried out at the concrete topping covering the parking deck.<sup>199</sup>

Mr. MacDonald inspected the Library and did not see any evidence of water damage as depicted in some photographs taken there in 2005.<sup>200</sup> There was no plastic covering the books in the Library. Mr. MacDonald also entered Zellers and walked through the common areas of the Mall, such as the corridors, and entered the tenant areas. He did not see any damage similar to that depicted in the photographs he was shown during his testimony anywhere in the Mall or any buckets to catch the leaks.<sup>201</sup> Mr. MacDonald testified that, if he had seen evidence of water damage as depicted in the photographs, he would have recommended to the Royal Bank that additional investigative work be conducted, including looking at the conditions above the ceiling tiles.<sup>202</sup>

Mr. MacDonald testified that during his inspection he did not observe any areas which stood out as having been recently repaired or “spruced-up.”<sup>203</sup> In his report, he also noted:

- 11 In many locations it is apparent that repairs have been carried out at the joints between adjacent sections of concrete topping. It appears that the joints in the concrete topping correspond to the joints between adjacent precast concrete slabs. We understand that the concrete in these locations was deteriorated, due to raveling of the concrete topping adjacent to the joints.
- 12 Joints between adjacent sections of concrete topping have been routed/chipped out and filled with a pourable mastic material. At some locations, the sealant material is de-bonded from the adjacent concrete surfaces ...<sup>204</sup>

Mr. MacDonald explained that “raveling” constituted cracking of the concrete parallel to the joint, usually caused by traffic on the concrete.<sup>205</sup>

Mr. MacDonald concluded in his report that the “parking, paving and exterior stairs” were in fair condition. He explained that this reference did not include the hollow-core precast panels or the steel structure and was only a reference to the top surface of the parking which he could see. He explained that he noted the surface of the parking deck as fair because he saw that there was some deferred maintenance – and the problems in the surface of the parking deck were maintenance issues.<sup>206</sup>

Mr. MacDonald concluded that an allowance of \$30,000 should be provided at five-year intervals for repairs to the concrete topping and associated joints at the rooftop parking deck, commencing in year two.<sup>207</sup>

Mr. MacDonald testified that this amount would have been based on the percentage of what he thought it would cost to carry out the repairs to the whole deck – namely, routing and sealing the joints and fixing the debonded and cracked areas.<sup>208</sup>

Although he agreed it was critically important that there be a thorough structural inspection of the connections, because failure of connections is most likely to result in a catastrophic event, Mr. MacDonald explained that he did not inspect the connections because that was not part of his mandate. In addition, he did not recommend to the bank that such an inspection be carried out because he did not believe, based on what he observed at the Mall, that such an inspection was required.<sup>209</sup>

Mr. MacDonald admitted that, had he known Retirement Living had ignored the recommendations made by Nicholls Yallowega Bélanger and instead continued with a patchwork repair process as had been carried out by Algocen for years, using the same personnel, it would have changed his approach and he would have wanted to see above the ceiling and do further investigation work.<sup>210</sup> He also testified that the maintenance worker he spoke to told him that, although the parking deck had leaked in the past, it was at that point watertight.<sup>211</sup> It is clear from the evidence I have heard, including the extensive evidence about the ongoing leaks in the Library and the admissions made by Mr. Kennealy at the meeting with the Library board *just 13 days before* this inspection and in his evidence before me, that the parking deck was not watertight in June 2005. The maintenance worker, who must have been an employee of NorDev, may well have misled Mr. MacDonald. Whether this was intentional in an effort to ensure a favourable report is difficult to say.



Mr. MacDonald testified that, in light of the information he was provided – that the concrete topping on the parking deck had been routed and sealed and the roof was watertight – and the lack of evidence of water damage on the interior of the Mall, he had no reason to believe that the interior steel structure would be compromised.<sup>212</sup> The visual inspection sought by RBC unfortunately did not reveal what was hidden in the ceiling of the Mall that day. In light of the fact that he was told about past leaking on the interior of the Mall and his limited observations, I feel that it is not unduly critical to opine that his report might have commented more explicitly on the fact that there was no inspection of the internal structural members.

### **August: Bob Nazarian further reduces his purchase price to \$6.2 million**

On July 28, 2005, Mr. Nazarian's lawyer received estoppel certificates (formal statements intended to advise a purchaser of, among other things, disputes between tenants and the vendor) from Mall tenants, including one from Scotiabank which said: "There have been recurrent water leaks into the Premises, and wherever this is the case, the occurrence of mould is a concern." Bob Nazarian's evidence was that, although his lawyer received this estoppel certificate before closing the transaction, he saw it only after closing; his lawyer did not tell him about this estoppel certificate prior to the letter the lawyer sent lowering the price to \$6.2 million. Mr. Nazarian could not explain why he did not ask the lawyer before closing about the content of any estoppel certificates he had received. Mr. Nazarian's evidence was that, on reading the estoppel certificate after the transaction closed, he spoke to Mr. Kennealy and Ms. Guertin about the leaks at a meeting I describe below.<sup>213</sup>

On August 2, 2005 (two days before the scheduled closing), Mr. Nazarian's lawyer sent a letter to NorDev's lawyer offering to amend the agreement to waive all the conditions, reduce the purchase price from \$7.2 to \$6.2 million, and extend the closing date by a day to August 5. Mr. Nazarian testified that he was "testing" NorDev to see if it would agree to reduce the price by another million dollars. He did this because he was concerned about the "secrecy" and the fact that NorDev was not giving him the information he was requesting. He was prepared to walk away from the deal if NorDev did not agree. According to Mr. Nazarian, Mr. Kennealy never asked him why he was reducing the price yet again. He had no conversation with Mr. Kennealy or Ms. Guertin about the reason for the price reduction – and that surprised him.<sup>214</sup>

I heard a very different account of the events from Mr. Kennealy. He testified that he was surprised and caught off guard when he received this letter – it was last minute and quite a large drop in price.<sup>215</sup> Mr. Kennealy testified that he spoke to Mr. Nazarian:

And what he related to me was sort of in a general sense was he had gotten his financing all lined up. I think he told me what the rough amount of it was. He had more than enough of his own free capital to complete the deal, but he wanted to hang on to the cash because he wanted to do additional work on the property and fix a bunch of things up. He did mention specifically the parking deck.

And the other thing I didn't mention earlier, we ... talked a number of times over the time period and ... we talked about all kinds of different things in terms of ... what he might want to do or might not want to do with the property. But on this occasion, he specifically mentioned that he wanted to look at doing some things on the parking deck, and I would have taken that to the Board and asked them what they wanted to do.<sup>216</sup>

When this testimony of Mr. Kennealy was put to Bob Nazarian in cross-examination, he changed his evidence and indicated it was "possible" that he gave Mr. Kennealy an explanation for reducing the purchase price from \$7.2 million to \$6.2 million but doubted it was related to the parking deck, contrary to Mr. Kennealy's evidence. He testified that they did not discuss the parking deck before the purchase.<sup>217</sup>

The same day, August 2, the NorDev board of directors met<sup>218</sup> and accepted all the conditions set out in the letter, including the reduced price of \$6.2 million. Mr. Hamilton, who was present at the meeting, testified that, other than the waiver of the financing condition, he did not recall any discussion to justify the reduction in price – which he admitted was not an insignificant amount of money. It was a recommendation made by the staff which the board agreed to. No board member objected. Mr. Hamilton testified that the condition of the Mall or the leaks and the cost of repairs did not play a role in the decision to accept the reduction in price.<sup>219</sup> Mr. Farkouh, who was also present at the meeting, could offer no explanation for the price reduction either.<sup>220</sup>

On August 8, 2005, the transaction closed and Eastwood Mall Inc. became the owner of the Mall. Bob Nazarian obtained a mortgage for \$4.65 million to finance the purchase of the Mall. This mortgage was somewhat unusual in that it was a “commercial mortgage backed securitization,” intended to spread the risk of default on a mortgage among a number of investors. The Royal Bank of Canada, the “mortgage servicer,” which had to act on instructions from the investors, advanced the funds.<sup>221</sup> Mr. Nazarian paid the remainder of the price in cash.<sup>222</sup>

The mortgage had a prepayment penalty equal to the greater of three months’ interest or the present value of all future interest payments; its term was 10 years. The mortgage stipulated that if the owner sold the property or tried to put a second mortgage on it without the lender’s consent, Eastwood would immediately have to repay the first mortgage, including the prepayment penalty. These mortgage features were unusually severe and eventually posed a problem for Bob Nazarian when he tried to sell the Mall.<sup>223</sup>

### **August–November: Rhonda Guertin is hired to train Eastwood’s manager but keeps mum about leaks**

After Bob Nazarian took over the Mall, he hired Ms. Guertin to train the new Mall manager. Mr. Nazarian testified that he hoped, if there was something that NorDev had not revealed before the closing, he could get that information in the four months Ms. Guertin was employed by him. In those months, Mr. Nazarian testified, he did not speak with her personally but, nonetheless, did not find her helpful in training his manager. She did not reveal any prior engineering reports and gave him no information about the roof leaks.<sup>224</sup>

### **Retirement Living received over \$2.2 million from its ownership of the Mall**

Although I accept Mr. Kennealy’s evidence that he did not receive any bonus as a result of the sale of the Mall (his managers received something in the order of \$1,000),<sup>225</sup> there is no doubt that Retirement Living profited handsomely from the sale. NorDev had purchased the Mall for \$4 million. It sold it for \$6.2 million. When the Mall was sold, NorDev paid Retirement Living a dividend of \$1 million, along with a commission of \$186,000.<sup>226</sup> Retirement Living also earned interest of \$698,000 from NorDev on its loan of \$2 million over the six years NorDev owned the Mall and management fees of \$392,000. Those payments, a direct benefit to Retirement Living from NorDev’s purchase of the Mall, amounted to \$2.2 million.<sup>227</sup>

During the time Retirement Living owned the Mall, its revenue exceeded expenses (since it is a not-for-profit corporation, it does not describe this as a “profit”) by an average of \$1.1 million per year.<sup>228</sup>

## Conclusion: Bob Nazarian did not know the extent of the leaks before buying the Mall

The evidence about whether Bob Nazarian was informed that the Mall had suffered from leaks from the day it opened was contradictory in many respects, including at times his own evidence. However, I conclude that, at the very least, Retirement Living was not forthright about the extent of the leaks that the Mall had suffered over the years, thereby preventing Mr. Nazarian from making an informed decision when he purchased the Mall. I reach that conclusion for the following reasons:

- Retirement Living was not prepared to provide Mr. Nazarian with the guarantees he had sought about any major defect; it wanted to sell the Mall “as-is”;
- Retirement Living agreed to two reductions in price totalling \$2 million without being provided with any real justification;
- Retirement Living did not provide Bob Nazarian, the Royal Bank, or Construction Control with any of the engineering reports it had about the Mall even though Mr. MacDonald asked for them;
- Mr. Kennealy’s own evidence was that he told Mr. Nazarian that the leaks could be controlled by maintenance, even though he knew that it was not so;
- Mr. MacDonald did not observe any evidence of leaks in the interior of the Mall during his inspection, including his visit to the Library, although there had been recent extensive leaking with resulting significant damage, suggesting that efforts had been made to remove evidence of leaks;
- Mr. MacDonald was misinformed by a NorDev employee who told him that the Mall was watertight;
- the City, through Mayor Farkouh, did not reveal the existence of the leaks to Mr. Nazarian despite its extensive knowledge about the dire situation of the Library; and
- Mr. Nazarian advised Mr. Fabris that he was not aware of the extent of the leaks when he bought the Mall.

Retirement Living’s lawyer submitted forcefully that Mr. Nazarian must have known about the leaks from the parking deck because his agent’s letter of early June 2005 proposing a reduction in the purchase price stated that Eastwood “intended to improve the condition of the property and the parking lot in due time.”<sup>229</sup> As explained above, Mr. Nazarian’s explanation for this statement is that he always intended to reduce the slope of the ground level parking lot facing Ontario Street. He and his son Levon did take some steps to achieve that a few years after the purchase. Furthermore, none of the documents or the witnesses referred to the rooftop parking area as a parking “lot,” a word more commonly used for a ground level parking area. In my view, Bob Nazarian’s explanation is probably accurate.

Bob Nazarian testified that he had been successful in every business enterprise he had undertaken “beside this Algo Mall which was a black hole for me.”<sup>230</sup> In this respect, he may have been an author of his own misfortune. He was clearly not cautious and prudent in his acquisition. His reliance on RBC’s limited inspection without even reading the Construction Control report, his acceptance of the “as is” stipulation without further inquiry, his lack of interest in the estoppel certificates, as well as the extraordinarily restrictive conditions of the Royal Bank mortgage are clear indications to me that the lure of a good bargain blinded him to the perils of ownership.



## Eastwood could afford to pay for necessary repairs

### Income tax returns, financial statements and his own documents are not generally indicative of Bob Nazarian's financial affairs

The Commission obtained a large number of documents regarding the financial affairs of the corporations controlled by Bob Nazarian. Table 1.7.1 sets out some of the information contained in documents relating to Eastwood Mall Inc., the corporation that purchased the Algo Centre in 2005.<sup>231</sup> As can be seen, differing figures are often given for the same income for the same period of time.

**Table 1.7.1 Eastwood Mall Inc. Summary of Financial Reporting Documents**

Financial Year	Reported Operations Income	Reported Net Income After Interest and Amortization	Document Type	Author and Date
2006	1,002,128		Profit & Loss Statement	
2006	589,261	151,040	Financial Statement	Hurmizi & Co., June 6, 2007
2006	585,661	125,724	Financial Statement	Hurmizi & Co. June 6, 2007
2006	1,044,261	784,166 <sup>232</sup>	Financial Statement	Hurmizi & Co., July 23, 2008
2006	848,785		The Algo Centre: Financial Performance <sup>233</sup>	Levon Nazarian, to assist in sale of Algo Centre <sup>234</sup>
2006		123,641	Tax Return	
2007	430,776	(11,485)	Financial Statement	Hurmizi & Co., July 14, 2009
2007	1,477,505	1,233,699	Financial Statement	Hurmizi & Co., July 23, 2008
2007	857,845 <sup>235</sup>		Statement of Income	Hurmizi & Co., Nov. 5, 2009
2007	765,211 <sup>236</sup>		The Algo Centre: Financial Performance	Levon Nazarian, to assist in sale of Algo Centre
2007	107,539 <sup>237</sup>		Profit & Loss Statement	
2007		(11,485)	Tax Return	
2008	186,020	(241,511)	Financial Statement	Hurmizi & Co., July 14, 2009
2008	478,704	45,071	Financial Statement	Hurmizi & Co., Sept. 22, 2008
2008	94,890	(101,492)	Financial Statement	Hurmizi & Co., June 5, 2008
2008	1,042,061		Financial Statement	Hurmizi & Co., Nov. 5, 2009
2008	207,710	(213,427)	Financial Statement	Hurmizi & Co., June 29, 2010
2008	218,238	(208,019)	Financial Statement	Hurmizi & Co., June 29, 2010
2008	1,063,874		The Algo Centre: Financial Performance	Levon Nazarian, to assist in sale of Algo Centre
2008		(239,985)	Profit & loss statement	
2008		(193,402)	Profit & loss statement	
2008	991,722		Statement of income	
2008		(213,416)	Tax return	
2008	1,001,722		Statement of income	

Financial Year	Reported Operations Income	Reported Net Income After Interest and Amortization	Document Type	Author and Date
2009	575,060	162,735	Financial statement	Hurmizi & Co., June 29, 2010
2009	504,552	92,799	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	872,825	418,591	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	613,762	202,009	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	1,206,555		The Algo Centre: financial performance	Levon Nazarian, to assist in sale of Algo Centre
2009		171,761	Income Tax Return	
2010	838,308	367,887	Financial Statement	Hurmizi & Co., Feb. 23, 2011
2010	406,387	6,018	Financial Statement	Hurmizi & Co., Feb. 23, 2011
2010	391,263	20,512	Financial Statement	Hurmizi & Co., Oct. 13, 2011
2010		24,759	Tax Return	

Source Exhibit 6184

It is apparent that all these purported results cannot be correct. The operating income for 2006 is reported in a range from a high of \$1,044,261 to a low of \$585,661; for 2007, from a high of \$1,477,505 to a low of \$107,539; for 2008, from a high of \$1,063,874 to a low of \$94,890.

Many of these documents are financial statements prepared by Sam Hurmizi, a chartered accountant. The financial statements prepared by him are accompanied by a "Notice to Reader":

On the basis of information provided by the company, I have compiled the Balance Sheet of Eastwood Mall Inc. as at December 31, [year] and the Statements of Income and Retained Earnings for the year then ended.

I have not performed an audit or a review engagement in respect of these financial statements and accordingly, I express no assurance thereon.

Readers are cautioned that these statements may not be appropriate for their purposes.<sup>238</sup>

That notice is provided to ensure that those who read the financial statements understand that the accountant who prepared them did not take any steps to ensure that the figures are accurate or reflect the financial state of the company at the time. As the statement says, the information in the statements was "provided by the company."

Levon Nazarian admitted that, on the basis of his experience and training, this type of financial statement was the lowest assurance of accuracy of three categories of financial statements issued by chartered accountants,<sup>239</sup> and that in this type of financial statement the accountant is merely passing on to the reader what he or she was told by management.<sup>240</sup> Bob Nazarian agreed that he understood that the financial statements were based on information provided to the accountant. He testified that he did not "get involved with the accounting" and that normally it was either his son or his wife who gathered the information and informed the accountant of the detail.<sup>241</sup> Levon Nazarian, however, testified that he was not involved with the financial statements and that the accountant took care of them.<sup>242</sup>

Some of the financial statements report information that is implausible on its face. On October 29, 2010, Mr. Hurmizi signed three different “Notice to Reader” Financial Statements for Eastwood Mall Inc. for the year ended December 31, 2009. Each of them was dated October 29, 2010, but stated different operating incomes – \$504,552,<sup>243</sup> \$613,762,<sup>244</sup> and \$872,825.<sup>245</sup> When asked about these discrepancies, Bob Nazarian suggested that each of these statements was prepared at a different time but given the same date because it was Mr. Hurmizi’s practice to issue all financial statements for the same period on the same indicated date even after new information necessitated an amendment. He would not explain, however, if that was so, why the accountant issued a fourth statement for the year ending December 31, 2009, with a different date – June 29, 2010.<sup>246</sup> Bob Nazarian could not explain the apparent inconsistency and admitted that he had simply presumed that the three documents dated October 29, 2010, were issued on different dates. He called Mr. Hurmizi’s work a “sloppy job” and testified that he had had trouble with Mr. Hurmizi and his office, and that is why he chose new accountants in 2011.<sup>247</sup> Levon Nazarian could not explain the discrepancies among the various versions either.<sup>248</sup>

Similarly, Bob Nazarian had no explanation for the variation in the reports of Eastwood Mall Inc.’s operations income in 2006 from a low of \$585,661 in one document to a high of \$1,044,261 in another. He could not explain why reported revenue in 2006 varied from \$2,235,238 in one document to exactly \$200,000 less in another. He had no explanation for why maintenance and repair figures varied between documents by exactly \$200,000 for the year ending December 31, 2006, or why salaries and benefits varied by exactly \$100,000. He testified, “I have no explanations. I just can say it’s a sloppy accounting job.” He had no explanation for similar discrepancies related to the years 2007, 2008, and 2009.<sup>249</sup>

Mr. Hurmizi issued two Eastwood Mall Inc. financial statements for 2010 on February 23, 2011. One showed net income, after interest and amortization, of \$367,887; the other showed net income of \$6,018. Levon Nazarian agreed that income of \$367,000 would have meant a good financial year. His evidence was that he could not recall if 2010 was a good year financially for the Algo Centre, and he could not assist in determining which statement was accurate.<sup>250</sup>

## **The Nazarians manipulated financial statements depending on their purpose**

It is apparent that the amounts shown in financial documents prepared by or on behalf of Bob Nazarian and his companies differed to accord with their intended purpose.

### **Tax return**

When asked to explain a financial statement produced by Mr. Hurmizi on July 23, 2008, for taxation year 2007 which showed net income of \$1,233,699, Bob Nazarian stated, “I do not agree with this at all ...” He testified that he knew his financial position at the time regardless of what the statements said and pointed to a loss of \$11,485 reported to Revenue Canada for that taxation year. In other words, the financial statements prepared for 2007 reported a profit, except for Eastwood’s tax return and the financial statement prepared by Mr. Hurmizi on another date which supported that loss.<sup>251</sup>

In an application to borrow money for the purchase of the Algo Centre, Bob Nazarian reported his personal business income as \$200,000. He agreed that he had reported only \$25,000 on his personal income tax return in 2005 but could not explain the discrepancy.<sup>252</sup> The tax returns and financial statements for Eastwood Mall for 2005, the year it bought the Algo Centre, are illustrative. During that year, the corporation sold property it



had owned for a number of years. That sale, with proceeds of \$6.2 million, resulted in a reported capital gain of \$1.5 million, of which \$750,000 – one half – would have been subject to income tax if the company did not have countervailing losses.<sup>253</sup> But Eastwood Mall Inc. paid no tax that year. It reported a loss of \$757,000 from its active business, resulting in a net loss for tax purposes of \$7,012.<sup>254</sup> The “loss,” which is almost exactly the amount of the taxable capital gain from the sale of the property, was a result of the “expenses” of Eastwood Mall being reported to have increased from \$750,000 in 2004 to \$1,577,715 in 2005.<sup>255</sup> Bob Nazarian could not explain how the expenses of Eastwood grew by almost exactly the amount of the capital gain from the reported sale of a property called the Northtown Plaza, the effect of which was to make the reported capital gain tax-free.<sup>256</sup>

Of the expenses on Eastwood Mall’s 2005 tax return reported to have increased from the previous year, the largest single item was “management fees,” which went from \$80,000 in 2004 to \$490,000 in 2005.<sup>257</sup> Bob Nazarian testified that, in 2005, he was running the company. Although there was a manager in place in the Algo Mall after he bought it in August 2005, he agreed that he did not pay her \$490,000 a year. When asked whether, “in terms of management, in the company, it was you, right?” he replied, “Yes, possible.” When asked if he was paid in the neighbourhood of \$490,000 to manage the company in 2005, he replied only that it was “possible.”<sup>258</sup> Although it may have been “possible” that he was paid that amount to manage the company in 2005, I find it very unlikely. Bob Nazarian reported income of only \$25,000 on his personal income tax return in 2005.<sup>259</sup> Eastwood earned a capital gain of \$1.5 million in 2005. I conclude that the most plausible explanation for this set of income tax returns is that, to avoid paying tax on the capital gain, Bob Nazarian either filed a corporate tax return that conveniently increased operating expenses by an amount sufficient to barely exceed the amount of the corporate taxable gain or filed a personal income tax return that failed to declare his income from the corporation for management fees. The result of these filings appears to have been the avoidance of tax on at least \$750,000 of income.

### Higher income shown in sales document

A document prepared by Levon Nazarian to market the Algo Centre to potential buyers showed the “net income” of the Algo Centre varying from \$848,785 in 2006 (the first full year Eastwood owned the Mall) to \$1,206,555 in 2009.<sup>260</sup> In a subsequent version of the same document, those numbers were changed to vary from \$1,298,742 in 2006 to \$1,414,142 in 2009.<sup>261</sup> Those income levels, in a document designed to interest potential purchasers, were significantly higher than levels reported in many other documents purporting to deal with the same time periods (although not always the highest reported net income for each of those years in documents obtained by the Commission). Levon Nazarian was unable to explain the discrepancies other than to blame Mr. Hurmizi. He testified that he had obtained some of this information from Mr. Hurmizi over the telephone, but he did not know where he got the balance of the information.<sup>262</sup> Bob Nazarian testified that he had seen the sales document before it was released, calling it a “beautiful brochure made by Levon, and everyone loves it.” Nevertheless, he said he took no steps to verify if the numbers were right.<sup>263</sup>

### Financial statement adjusted for loan application

One of the three financial statements issued on October 29, 2010, purporting to reflect Eastwood’s financial affairs for the 2009 financial year, listed the company’s operations income as \$613,762 and its net income as \$202,009. Those figures were midway between what is found in the other two financial statements for the same period issued on the same day and showed net income only slightly higher than the taxable income of \$171,761 reported to the Canada Revenue Agency. Levon Nazarian provided that statement to the Canadian Imperial Bank of Commerce on December 12, 2010, to support a loan application by Eastwood.<sup>264</sup>

Levon Nazarian had received that financial statement from Mr. Hurmizi on October 29, 2010, attached to an email in which Mr. Hurmizi wrote:

Here is the f.s., please review it before you release. Because it is going to a bank I cant play too much. We have to show them what was filed with CRA its up to them to normalize them (take things out).<sup>265</sup>

Neither Bob Nazarian nor his son could provide a credible explanation for this message.<sup>266</sup> The closest thing to an explanation that either of them provided was by Bob Nazarian after the email was shown to him:

Q. Tell me, again, is this a practice that Eastwood Mall would involve Mr. Hurmizi in, playing with the financial statements to portray different financial pictures?

A. Actually I think just the opposite. This is simply telling us that the accountant is not bending to whatever we would like to do.

Q. So you are trying to get him to play with the financial statements and he's refusing; is that what you take that to be?

A. We would like to be as nice as possible, of course.<sup>267</sup>

I conclude that the Nazarians were knowingly providing a financial statement to the bank which showed a level of income that was respectable enough to get a loan, but not so high as to invite close scrutiny of the Canada Revenue Agency filings for comparison and verification. The pattern used is clear: create, directly or indirectly, documents that provide financial information tailored to suit a particular purpose.

### Financial statement adjusted to support property tax appeal

Another of the October 29, 2010, financial statements illustrates similar behaviour. In the fall of 2011, Eastwood was appealing its property tax assessment in order to have it lowered. The assessment was based, among other things, on a capitalization of the income of the property – the lower the income, the lower the Algo Centre's value. On September 9, 2011, Wing Yan, a bookkeeper who worked with Mr. Hurmizi, sent an email to Irene Nazarian in which she wrote:

For the property tax, you fax rene, you should not send eastwood 2009 for him, eastwood 2009 you have is for the mall buyer.

I will email him what rene need.

You need to explain to rene, do not use eastwood 2009 financial statement you faxed to him.<sup>268</sup>

Later the same day, Ms. Yan sent an email to Mr. Fabris (copying Bob Nazarian and Irene Nazarian) stating: "Please find attached financial statement for property tax appeal."<sup>269</sup> The attachment to that email was the 2009 Eastwood financial statement prepared by Mr. Hurmizi on October 29, 2010, that showed the lowest income.<sup>270</sup> Mr. Fabris testified that he received two financial statements, that the second showed a lower income for the Algo Centre, and that he used the second statement to pursue the appeal with the Municipal Property Assessment Corporation.<sup>271</sup>

Bob Nazarian was asked if he knew that, of the three financial statements issued on October 29, 2010, the one that showed the lowest income for the Algo Centre was the one sent to his lawyer for the property tax appeal. His answer, after much evasion of the question, was "Possible. I can't answer that. I'm sorry, I can't answer that."<sup>272</sup> He could not explain why the higher income statement was sent to the bank from which they were seeking a loan, and the lower income statement was used in the property tax appeal.<sup>273</sup>

The most likely explanation is the obvious one – that one or more of the Nazarians instructed Mr. Hurmizi to prepare different sets of financial statements to be used for different purposes, and intentionally misrepresented the income of the company to suit each purpose.

### Agreement of purchase and sale created to support property tax appeal

The willingness of the Nazarians to misrepresent the true state of their financial affairs to obtain an advantage is further illustrated by another step taken in the appeal of the property tax assessment in 2011. On May 6, 2011, Eastwood Mall Inc. entered into an agreement to sell the Algo Centre to “Tom Kovacevic in Trust” for \$5.5 million (the Kovacevic May 6 Agreement).<sup>274</sup> That agreement was subject to a number of conditions, including that the buyer conduct due diligence within 15 days. An amending agreement extended that due diligence period, so that it expired on May 31, 2011 (the Kovacevic May 20 Amending Agreement).<sup>275</sup> Bob Nazarian signed the agreement on May 6 and the amending agreement on May 20, 2011.

On May 12, 2011, however, while the Kovacevic May 6 Agreement was outstanding and binding on Eastwood, Bob Nazarian executed an agreement of purchase and sale with “Ali Heydarian in Trust” to sell the Algo Centre for \$3.9 million, \$1.6 million less than the price he was already committed to sell it at (the Heydarian May 12 Agreement). That agreement was subject to a condition that the buyer conduct due diligence within 15 days. It provided that the purchase would close on June 30, 2011.<sup>276</sup> Levon Nazarian testified that it was a legitimate agreement and that the purchase was intended to be completed by Mr. Heydarian’s uncle.<sup>277</sup> When confronted with the fact that Eastwood had entered into two agreements to sell the Algo Centre at the same time, Bob and Levon Nazarian gave different explanations. Levon Nazarian testified that the Kovacevic May 6 Agreement was accepted by Eastwood because Mr. Kovacevic “seemed very serious.” He agreed that it was a binding agreement.<sup>278</sup> Bob Nazarian, however, testified that he thought that Mr. Kovacevic’s offer was bogus.<sup>279</sup> It was his evidence that he knew from the time he signed the Kovacevic May 6 Agreement that it was not going to close, and, as a result, he felt free to sign the Heydarian May 12 Agreement. When asked why, if that was so, he signed the Kovacevic May 20 Amending Agreement, after he had signed the Heydarian May 12 Agreement, he had no answer. He testified:

Q. So first of all on May 6th you sign a deal to sell it for 5.5, on May 12th you sign a deal to sell it for 3.9, and on May 20th you agree to extend the due diligence period for the 5.5 deal –

A. It is simply –

Q. – keeping it alive.

A. Yes.

Q. Why would you do that?

A. It simply shows our desperation that we want to get rid of this mall under any circumstances whatsoever.

Q. But you would have been in a pretty pickle if Mr. Kovacevic had decided to try and close?

A. We knew a hundred per cent, not 99, but a hundred per cent that Mr. Kovacevic is the man of ... Mr. McCowan, and they are there to take our mall, not to buy.

Q. And did you know a hundred per cent that he was not going to close?

A. Yes.

Q. Well, if you knew a hundred per cent that he was not going to close, why did you sign the agreement to extend it?

A. Just ... for the sake of it.

Q. Just because you’ll sign anything?

A. No. At this point, just for the sake of saying that, yes, we are in the business.<sup>280</sup>



Levon Nazarian's evidence was different. He testified that he was not treating the Kovacevic May 6 Agreement as null and void, although he "could have used the excuse that there was no cheque deposited, so that could terminate it or void it at any time."<sup>281</sup> He then testified that the Heydarian May 12 Agreement was "dead" on May 15 (five days before the Kovacevic May 20 Amending Agreement), because on that date a mutual release was entered into between Mr. Heydarian and Eastwood which terminated the Heydarian May 12 Agreement and released both parties of any obligations in it.<sup>282</sup> The release obtained by the Commission, however, is executed only by Mr. Heydarian, and not executed by anyone on behalf of Eastwood.<sup>283</sup> When this detail was pointed out to Levon Nazarian, he testified that the mutual release was executed by him; he subsequently changed his evidence to say that it had been executed by his father (on a copy which was not produced) because he, Levon Nazarian, did not have authority to sign on behalf of Eastwood.<sup>284</sup>

The Nazarians did not, however, treat the Heydarian May 12 Agreement to sell the Algo Centre for \$3.9 million as "dead" after May 15. Instead, on June 6, 2011, Mr. Fabris provided a copy of it to the Municipal Property Assessment Corporation in support of Eastwood's appeal of the property tax assessment. He wrote:

Attached herewith ... is a copy of the most recent Agreement of Purchase and Sale valuing the mall at \$3,900,000.00. I can advise you that the purchasers are still proceeding with their due diligence and one of the conditions of the sale is the pursuance of this application.<sup>285</sup>

Mr. Fabris did not advise the Municipal Property Assessment Corporation about the \$5.5 million Kovacevic May 6 Agreement. He testified that he was not aware of it, that he had asked Bob Nazarian to provide him with any offers that they had, and the only one he was given was the Heydarian May 12 Agreement.<sup>286</sup> Bob Nazarian testified initially that he did not know why Mr. Fabris did not advise the Municipal Property Assessment Corporation about the Kovacevic May 6 Agreement; he subsequently testified that he (Bob Nazarian) "didn't see that [it] is necessary."<sup>287</sup> Levon Nazarian testified that he gave Mr. Fabris the Heydarian May 12 Agreement and that he did not give him the Kovacevic May 6 Agreement because he did not think that the Algo Centre was worth \$5.5 million. Both Levon and Bob Nazarian denied that the \$3.9 million Heydarian May 12 Agreement was bogus.<sup>288</sup>

Bob Nazarian is a very experienced businessman, and he would not knowingly enter into two agreements of purchase and sale for the same property at the same time, thereby exposing himself to a potential lawsuit. Having Mr. Heydarian sign the release on May 15, and leaving the document unsigned by Bob Nazarian, gave him the option of backing out of the agreement at any time by simply executing the release. As I will explain later in this Report, the Heydarian May 12 Agreement for \$3.9 million was, by a significant amount, the lowest offer ever accepted by Bob Nazarian for the Algo Centre. Although the Nazarians have testified that the Heydarian May 12 Agreement was a *bona fide* attempt to sell the property, their actions belie their words. I conclude that Eastwood likely entered into the \$3.9 million agreement with Mr. Heydarian solely to support the property tax assessment appeal, and there was no intention on the part of the Nazarians to sell it to Mr. Heydarian for that price.

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## **Bob Nazarian could afford to pay for necessary repairs, but he chose not to put any more money into the “black hole”**

### **Manipulation of documents shows there are significant assets to hide**

One may ask why, given my mandate, I heard evidence and have reached conclusions about the manipulation of tax returns, financial statements, and legal documents by the Nazarians and the corporations they controlled. I have been asked to determine the causes of the collapse. One of the issues before me is whether the collapse could have been averted by timely investment in repairs and maintenance. The financial ability of the owner to make such an investment is relevant to that issue.

In my ruling on Eastwood’s motion to keep confidential the financial information it had submitted dated January 8, 2013, I responded as follows:<sup>289</sup>

Further, I am unable to agree with the applicants’ contention that the financial information provided “could not possibly assist in determining how the collapse occurred on June 23, 2012.” (paragraph 19 of the original submissions). I am of the opposite view. Proper maintenance of commercial structures is an essential component of structural integrity. Proper maintenance costs money. While it is premature for the Commission to reach any conclusion on the cause of the mall collapse, it is only logical that a careful examination of maintenance procedures of the Algo Mall in the years prior to the collapse be carried out. The nature and extent of these procedures as well as their cost must be carefully investigated and analyzed. In that process, the Mall owners’ financial circumstances are directly relevant and of significant importance.

In addition, these manipulations support my opinion of the Nazarians’ credibility. The activities I have outlined, and the findings I have made, have led me to conclude that the financial documents purporting to show income or assets under the control of Bob Nazarian cannot be relied upon as accurate. That conclusion does not answer the question of whether he had sufficient funds to make any necessary repairs. It does allow me to conclude that he has not established that he could not afford to do it, despite his frequent protests from the witness box that he did not have any money. It is only common sense to observe, however, that people do not engage in such subterfuge, or conceal the truth about their income from the tax authorities, if there are no assets and income to conceal. I am comfortable in concluding that Bob Nazarian probably did have sufficient assets to pay for repairs.

### **Bob and Levon Nazarian admitted their companies had significant assets**

However, the evidence of Bob and Levon Nazarian that I find safe to accept allows me to reach this conclusion on other grounds as well. They effectively admitted to having significant assets at their disposal. As I have explained above, Bob Nazarian or his family were shareholders in a number of different companies. Bob Nazarian admitted that those companies would loan money to one another as needed (including to Eastwood) and that his personal money was available to be used to deal with the financial needs of his corporations.<sup>290</sup> I accept that evidence. It is consistent with the way in which he carried on his businesses. In addition, many of the financial statements for companies in which he had an interest had a reference to debts due to or from shareholders or associated companies.

Levon Nazarian prepared a document in 2010 or later listing the purchases and sales by one or more of the corporations affiliated with Eastwood since 1994.<sup>291</sup> Both men testified that the document was created to support a loan to one or more of the companies.<sup>292</sup> Both Levon and his father were examined at length about the nine transactions referred to in the document. They were able to recall specific transactions, the price paid and received for properties, the amount of mortgages placed on the various properties, the income earned by

the buildings in issue, and reasons why, in particular cases, the figures set out in the document were not quite accurate. I accept that the evidence given by them as to the profit made by each of the companies on these sales was generally accurate.

Levon Nazarian testified that, over the period covered by the document, the affiliated companies earned about \$10 million in profit, of which approximately \$3.3 million in cash was reinvested in properties. He agreed that, after the purchase of the Algo Centre, approximately \$6.7 million in capital was left. He did not know what had happened to that capital.<sup>293</sup>

Bob Nazarian testified that, over that period of time, the affiliated companies earned about \$11.05 million, of which approximately \$3.1 million was reinvested in properties. He testified that the difference of \$7.95 million was what he earned with those developments over that period.<sup>294</sup>

I cannot determine exactly how much money had in fact been earned by Bob Nazarian or one of his companies and was available capital from 1994 to at least 2010. There is a difference of \$1.25 million between the figures cited by him and his son – one claiming \$6.7 million, and the other \$7.95 million. I am satisfied that the correct figure is likely somewhere in the range between those two amounts.

### **Bob Nazarian admitted he could have invested more in the Algo Centre, but he chose not to**

When asked what happened to that money, Bob Nazarian replied:

- A. What happened to that money? That's a very interesting question. I build my house. I have a very, I would say, nice location, a 6,000 square foot house in a half acre of land. I have a good life. I'm successful virtually on every deal that I have done – besides Algo Mall. I don't know.<sup>295</sup>

Later, Bob Nazarian volunteered that, in August 2009, he had money available from the sale of other properties which he could have used to pay off the mortgage on the Algo Centre, but he had used it to purchase another property at a cost of \$2.65 million. When asked why he did not use that money to fix the roof, he replied:

- Q. Instead of putting the money down to pay – to buy that, you could have used that money to fix the roof, couldn't you?

A. I wouldn't do that.

Q. Why not?

A. Because ...

Q. Because why?

A. The Algo Mall was a black hole that no matter how much money you put in, as Mr. Norr's report, sir, even before I purchase, that mall was doomed.

Q. So you simply wouldn't put that money in?

A. Simply I would not put my life in it, no. I worked 42 years to gather some fund for my family. I'm not going to put everything in this building and God forbid what happened, if it continues, everything goes down the drain.<sup>296</sup>

**"The Algo Mall was a black hole that no matter how much money you put in, as Mr. Norr's report, sir, even before I purchase, that mall was doomed."  
– Bob Nazarian**

I conclude that Bob Nazarian had the money available, at all times, to carry out whatever repairs were required to fix the leaking. He chose not to invest the money because he decided that his assets were better placed elsewhere. Bob Nazarian had decided, early on, that his financial interests would be better served by selling the Algo Centre than by fixing it.



## Notes

- <sup>1</sup> Bob Nazarian testimony, July 23, 2013, pp. 17428–9.
- <sup>2</sup> Levon Nazarian testimony, July 15, 2013, pp. 16158, 16190; July 16, 2013, pp. 16460–1.
- <sup>3</sup> Bob Nazarian testimony, July 23, 2013, p. 17430; Levon Nazarian testimony, July 15, 2013, p. 16159.
- <sup>4</sup> Bob Nazarian testimony, July 23, 2013, p. 17430; Levon Nazarian testimony, July 15, 2013, pp. 16159–60.
- <sup>5</sup> Exhibit 1694, p. 014.
- <sup>6</sup> Bob Nazarian testimony, July 23, 2013, pp. 17487–8.
- <sup>7</sup> Bob Nazarian testimony, July 23, 2013, p. 17432.
- <sup>8</sup> Levon Nazarian testimony, July 15, 2013, p. 16165; Bob Nazarian testimony, July 23, 2013, p. 17431.
- <sup>9</sup> Kennealy testimony, April 18, 2013, pp. 5640–1.
- <sup>10</sup> Kennealy testimony, April 18, 2013, p. 5642.
- <sup>11</sup> Hamilton testimony, July 8, 2013, pp. 14973–4; Collett testimony, May 23, 2013, pp. 11096–9; May 24, 2013, pp. 11399–400.
- <sup>12</sup> Kennealy testimony, April 18, 2013, pp. 5643–4.
- <sup>13</sup> Exhibit 2286.
- <sup>14</sup> Exhibit 2286, p. 007; Exhibit 2285.
- <sup>15</sup> Farkouh testimony, May 7, 2013, pp. 8246–7.
- <sup>16</sup> Bob Nazarian testimony, July 23, 2013, pp. 17561–2.
- <sup>17</sup> Bob Nazarian testimony, July 23, 2013, p. 17565; July 26, 2013, pp. 18554–5.
- <sup>18</sup> Snow testimony, April 3, 2013, pp. 3985–6.
- <sup>19</sup> Bob Nazarian testimony, July 23, 2013, pp. 17562–6; Exhibit 9-126.
- <sup>20</sup> Bob Nazarian testimony, July 23, 2013, p. 17566.
- <sup>21</sup> Bob Nazarian testimony, July 26, 2013, pp. 18555–6.
- <sup>22</sup> Bob Nazarian testimony, July 23, 2013, pp. 17576–7.
- <sup>23</sup> Bob Nazarian testimony, July 26, 2013, pp. 18555–6.
- <sup>24</sup> Bob Nazarian testimony, July 23, 2013, pp. 17565–7; Exhibit 706.
- <sup>25</sup> Bob Nazarian testimony, July 23, 2013, pp. 17570–1.
- <sup>26</sup> Exhibit 2288.
- <sup>27</sup> Guertin testimony, April 19, 2013, pp. 5992–3.
- <sup>28</sup> Exhibit 2288; Kennealy testimony, April 18, 2013, p. 5645; Farkouh testimony, May 7, 2013, p. 8249.
- <sup>29</sup> Hamilton testimony, July 8, 2013, p. 14975.
- <sup>30</sup> Exhibit 706.
- <sup>31</sup> Bob Nazarian testimony, July 23, 2013, pp. 17571–3; Exhibit 706, p. 2325.
- <sup>32</sup> Exhibit 706, p. 338.
- <sup>33</sup> Kennealy testimony, April 18, 2013, pp. 5654–5.
- <sup>34</sup> Bob Nazarian testimony, July 23, 2013, p. 17573.
- <sup>35</sup> Kennealy testimony, April 18, 2013, p. 5765.
- <sup>36</sup> Kennealy testimony, April 18, 2013, p. 5765.
- <sup>37</sup> Bob Nazarian testimony, July 23, 2013, pp. 17577–80.
- <sup>38</sup> Bob Nazarian testimony, July 23, 2013, pp. 17578–80.
- <sup>39</sup> Exhibit 35; Bob Nazarian testimony, July 23, 2013, pp. 17607–8.
- <sup>40</sup> Exhibit 44; Bob Nazarian testimony, July 23, 2013, p. 17608.
- <sup>41</sup> Exhibit 51; Bob Nazarian testimony, July 23, 2013, pp. 17608–9.
- <sup>42</sup> Exhibit 65; Bob Nazarian testimony, July 23, 2013, p. 17609.
- <sup>43</sup> Exhibit 67; Bob Nazarian testimony, July 23, 2013, p. 17609.
- <sup>44</sup> Exhibit 67, p. 0034; Bob Nazarian testimony, July 23, 2013, pp. 17609–10.
- <sup>45</sup> Exhibit 70; Bob Nazarian testimony, July 23, 2013, p. 17610.
- <sup>46</sup> Bob Nazarian testimony, July 26, 2013, pp. 18558–64; Exhibit 5348, p. 1984.
- <sup>47</sup> Kennealy testimony, April 18, 2013, pp. 5648–9.
- <sup>48</sup> Kennealy testimony, April 18, 2013, p. 5650.
- <sup>49</sup> Guertin testimony, April 19, 2013, pp. 5994–5.
- <sup>50</sup> Kennealy testimony, April 18, 2013, pp. 56512–13.
- <sup>51</sup> Guertin testimony, April 19, 2013, pp. 5994–5.
- <sup>52</sup> Kennealy testimony, April 18, 2013, pp. 5766–7.
- <sup>53</sup> Kennealy testimony, April 18, 2013, p. 5767.
- <sup>54</sup> Guertin testimony, April 19, 2013, p. 5995.
- <sup>55</sup> Guertin testimony, April 19, 2013, pp. 5995–7.
- <sup>56</sup> Guertin testimony, April 19, 2013, p. 5997.
- <sup>57</sup> Fabris testimony, July 11, 2013, pp. 15597–8.
- <sup>58</sup> Bob Nazarian testimony, July 23, 2013, pp. 17574–6.
- <sup>59</sup> Bob Nazarian testimony, July 23, 2013, p. 17574.
- <sup>60</sup> Bob Nazarian testimony, July 23, 2013, pp. 17574–6.
- <sup>61</sup> Bob Nazarian testimony, July 23, 2013, pp. 17580–1.
- <sup>62</sup> Exhibits 11-81 and 2048.
- <sup>63</sup> Fazekas testimony, March 12, 2013, p. 1214.
- <sup>64</sup> Fazekas testimony, March 12, 2013, p. 1215.
- <sup>65</sup> Fazekas testimony, March 12, 2013, p. 1217.
- <sup>66</sup> Fazekas testimony, March 12, 2013, p. 1217.
- <sup>67</sup> Speck testimony, April 24, 2013, pp. 6755–7; Exhibit 11-81.
- <sup>68</sup> Speck testimony, April 24, 2013, p. 6758.
- <sup>69</sup> Speck testimony, April 25, 2013, pp. 6928–9.
- <sup>70</sup> Speck testimony, April 25, 2013, p. 6929.
- <sup>71</sup> Speck testimony, April 25, 2013, p. 6955.
- <sup>72</sup> Fazekas testimony, March 12, 2013, pp. 1224–5; Exhibit 11-83.
- <sup>73</sup> Exhibit 11-84.
- <sup>74</sup> Exhibit 11-82.
- <sup>75</sup> Clouthier testimony, April 23, 2013, pp. 6347–8; Allard testimony, April 29, 2013, pp. 7046–51.
- <sup>76</sup> Clouthier testimony, April 23, 2013, pp. 6347–8; Allard testimony, April 29, 2013, pp. 7046–51.
- <sup>77</sup> Farkouh testimony, May 7, 2013, p. 8252.
- <sup>78</sup> Hamilton testimony, July 8, 2013, pp. 15009–10; Exhibit 11-82.
- <sup>79</sup> Hamilton testimony, July 8, 2013, pp. 15010–13; Exhibit 11-82.
- <sup>80</sup> Hamilton testimony, July 8, 2013, pp. 15006–14; Exhibit 11-82.
- <sup>81</sup> Denley testimony, June 4, 2013, pp. 12844–5.
- <sup>82</sup> Denley testimony, June 4, 2013, pp. 12845–6.
- <sup>83</sup> Exhibit 11-84.
- <sup>84</sup> Allard testimony, April 29, 2013, pp. 7052–62; Exhibit 11-84.
- <sup>85</sup> Sprague testimony, July 12, 2013, pp. 16020–1; Exhibit 11-84.
- <sup>86</sup> Exhibit 11-84.
- <sup>87</sup> Exhibit 11-84, p. 4683.
- <sup>88</sup> Fazekas testimony, March 12, 2013, p. 1234.
- <sup>89</sup> Speck testimony, April 24, 2013, p. 6771.
- <sup>90</sup> Farkouh testimony, May 7, 2013, pp. 8264–5.
- <sup>91</sup> Allard testimony, April 29, 2013, pp. 7052–62; Exhibit 11-84.
- <sup>92</sup> Exhibit 11-84.
- <sup>93</sup> Fazekas testimony, March 12, 2013, p. 1250; Speck testimony, April 24, 2013, p. 6779.
- <sup>94</sup> Clouthier testimony, April 23, 2013, p. 6349; Allard testimony, April 29, 2013, pp. 7062–3.
- <sup>95</sup> Hamilton testimony, July 9, 2013, pp. 15020–4.
- <sup>96</sup> Exhibit 11-80.
- <sup>97</sup> Fazekas testimony, March 12, 2013, pp. 1243–7.
- <sup>98</sup> Speck testimony, April 25, 2013, pp. 6789–91; Exhibit 11-87.
- <sup>99</sup> Speck testimony, April 25, 2013, p. 6791.
- <sup>100</sup> Speck testimony, April 25, 2013, p. 6792.
- <sup>101</sup> Exhibit 11-85; Speck testimony, April 25, 2013, pp. 6787–9.
- <sup>102</sup> Exhibit 11-88.
- <sup>103</sup> Exhibit 11-93.
- <sup>104</sup> Exhibit 11-31; Dennis testimony, April 30, 2013, pp. 7526–7.

- <sup>105</sup> Regan testimony, June 5, 2013, pp. 13029–33.
- <sup>106</sup> Regan testimony, June 5, 2013, p. 13041; Exhibit 1436.
- <sup>107</sup> Exhibit 11-15.
- <sup>108</sup> Fazekas testimony, March 12, 2013, p. 1252.
- <sup>109</sup> Farkouh testimony, May 7, 2013, pp. 8271–2.
- <sup>110</sup> Exhibit 11-93; Speck testimony, April 25, 2013, p. 6834.
- <sup>111</sup> Speck testimony, April 25, 2013, pp. 6957–9.
- <sup>112</sup> Exhibit 3308.
- <sup>113</sup> Exhibit 11-94.
- <sup>114</sup> Fazekas testimony, March 12, 2013, p. 1252.
- <sup>115</sup> Exhibit 11-95.
- <sup>116</sup> Fazekas testimony, March 12, 2013, p. 1255.
- <sup>117</sup> Speck testimony, April 25, 2013, p. 6835.
- <sup>118</sup> Farkouh testimony, May 7, 2013, pp. 8274–5; Exhibit 11-95.
- <sup>119</sup> Farkouh testimony, May 7, 2013, p. 8275–6.
- <sup>120</sup> Exhibit 11-97.
- <sup>121</sup> Speck testimony, April 25, 2013, p. 6839; Exhibit 3311.
- <sup>122</sup> Clouthier testimony, April 23, 2013, p. 6347; Sprague testimony, July 12, 2013, p. 16022, and Exhibit 11-88.
- <sup>123</sup> Exhibit 11-95.
- <sup>124</sup> Exhibit 11-6.
- <sup>125</sup> Fazekas testimony, March 12, 2013, p. 1261.
- <sup>126</sup> Fazekas testimony, March 12, 2013, p. 1261.
- <sup>127</sup> Exhibit 2295, p. 016.
- <sup>128</sup> Kennealy testimony, April 18, 2013, p. 5661.
- <sup>129</sup> Kennealy testimony, April 18, 2013, pp. 5661–2.
- <sup>130</sup> Quinn testimony, April 16, 2013, p. 4986.
- <sup>131</sup> Kennealy testimony, April 18, 2013, p. 5662.
- <sup>132</sup> Hamilton testimony, July 8, 2013, pp. 14979–83; Farkouh testimony, May 7, 2013, pp. 8277–8.
- <sup>133</sup> Exhibit 11-105.
- <sup>134</sup> Exhibit 11-106.
- <sup>135</sup> Speck testimony, April 25, 2013, pp. 6841–3.
- <sup>136</sup> Exhibit 11-100.
- <sup>137</sup> Clouthier testimony, April 23, 2013, pp. 6352–3, 6355.
- <sup>138</sup> Allard testimony, April 29, 2013, pp. 7065–9.
- <sup>139</sup> Exhibit 2351, p. 019.
- <sup>140</sup> Farkouh testimony, May 2, 2013, p. 8074; Speck testimony, April 25, 2013, p. 6846.
- <sup>141</sup> Farkouh testimony, May 2, 2013, p. 8075.
- <sup>142</sup> Exhibit 11-101.
- <sup>143</sup> Fazekas testimony, March 12, 2013, p. 1266.
- <sup>144</sup> Exhibits 2296 and 706, p. 2348.
- <sup>145</sup> Bob Nazarian testimony, July 23, 2013, pp. 17581–4.
- <sup>146</sup> Bob Nazarian testimony, July 29, 2013, p. 18891; Exhibit 2296.
- <sup>147</sup> Kennealy testimony, April 18, 2013, pp. 5656–7; Exhibit 706, p. 2345.
- <sup>148</sup> Kennealy testimony, April 18, 2013, p. 5657.
- <sup>149</sup> Bob Nazarian testimony, July 23, 2013, pp. 17587–8; Exhibit 706, p. 2352.
- <sup>150</sup> Exhibit 1522.
- <sup>151</sup> Bob Nazarian testimony, July 26, 2013, pp. 18564–8.
- <sup>152</sup> Farkouh testimony, May 7, 2013, pp. 8282–3.
- <sup>153</sup> Farkouh testimony, May 7, 2013, pp. 8283–4.
- <sup>154</sup> Bob Nazarian testimony, July 26, 2013, pp. 18564–8.
- <sup>155</sup> Kennealy testimony, April 18, 2013, pp. 5665–6.
- <sup>156</sup> Exhibit 11-18, p. 003.
- <sup>157</sup> Kennealy testimony, April 18, 2013, pp. 5678–9.
- <sup>158</sup> Exhibit 11-103.
- <sup>159</sup> Kennealy testimony, April 18, 2013, pp. 5666–7.
- <sup>160</sup> Kennealy testimony, April 18, 2013, pp. 5668–9.
- <sup>161</sup> Kennealy testimony, April 18, 2013, pp. 5669–71.
- <sup>162</sup> Kennealy testimony, April 18, 2013, pp. 5674–6.
- <sup>163</sup> Exhibit 11-103.
- <sup>164</sup> Farkouh testimony, May 7, 2013, pp. 8296–7.
- <sup>165</sup> Farkouh testimony, May 7, 2013, pp. 8297–8.
- <sup>166</sup> Hamilton testimony, July 8, 2013, pp. 14983–6.
- <sup>167</sup> Hamilton testimony, July 8, 2013, pp. 14986–8.
- <sup>168</sup> Hamilton testimony, July 8, 2013, pp. 14983–6.
- <sup>169</sup> Fazekas testimony, March 12, 2013, p. 1282.
- <sup>170</sup> Fazekas testimony, March 12, 2013, pp. 1274–5.
- <sup>171</sup> Exhibit 13-4, p. 002; McCulloch testimony, June 13, 2013, pp. 14374–5.
- <sup>172</sup> McCulloch testimony, June 13, 2013, p. 14378.
- <sup>173</sup> Exhibit 750.
- <sup>174</sup> McCulloch testimony, June 13, 2013, pp. 14378–9.
- <sup>175</sup> Exhibit 750.
- <sup>176</sup> McCulloch testimony, June 13, 2013, p. 14379.
- <sup>177</sup> Exhibit 750; McCulloch testimony, June 13, 2013, pp. 14380–1.
- <sup>178</sup> Hass testimony, June 14, 2013, pp. 14527–8; Exhibit 13-6.
- <sup>179</sup> McCulloch testimony, June 13, 2013, p. 14381.
- <sup>180</sup> MacDonald testimony, April 24, 2013, pp. 6548–9; Exhibit 2349, pp. 001–004.
- <sup>181</sup> MacDonald testimony, April 24, 2013, pp. 6548–9.
- <sup>182</sup> MacDonald testimony, April 24, 2013, pp. 6551–2, 6554–5, 6568; Exhibit 844, p. 012.
- <sup>183</sup> Exhibit 844, p. 012; MacDonald testimony, April 24, 2013, pp. 6570–1.
- <sup>184</sup> MacDonald testimony, April 24, 2013, pp. 6552–4.
- <sup>185</sup> MacDonald testimony, April 24, 2013, pp. 6556–7.
- <sup>186</sup> Kennealy testimony, April 18, 2013, p. 5682.
- <sup>187</sup> MacDonald testimony, April 24, 2013, pp. 6558–61, 6606.
- <sup>188</sup> MacDonald testimony, April 24, 2013, pp. 6561–2.
- <sup>189</sup> MacDonald testimony, April 24, 2013, p. 6574; Exhibit 844, p. 013.
- <sup>190</sup> MacDonald testimony, April 24, 2013, p. 6563.
- <sup>191</sup> MacDonald testimony, April 24, 2013, pp. 6600–1.
- <sup>192</sup> Exhibit 2349, p. 005.
- <sup>193</sup> MacDonald testimony, April 24, 2013, p. 6618.
- <sup>194</sup> MacDonald testimony, April 24, 2013, p. 6569.
- <sup>195</sup> MacDonald testimony, April 24, 2013, pp. 6571–3; Exhibit 844, p. 013.
- <sup>196</sup> MacDonald testimony, April 24, 2013, p. 6565; Exhibit 844.
- <sup>197</sup> MacDonald testimony, April 24, 2013, pp. 6575–6; Exhibit 844, p. 018.
- <sup>198</sup> MacDonald testimony, April 24, 2013, pp. 6585–7; Exhibit 844, pp. 021 and 036.
- <sup>199</sup> Exhibit 844, p. 021.
- <sup>200</sup> Exhibits 2031, 2032, 2039, 2044.
- <sup>201</sup> MacDonald testimony, April 24, 2013, pp. 6577–83.
- <sup>202</sup> MacDonald testimony, April 24, 2013, pp. 6583–4; Exhibit 844, p. 021.
- <sup>203</sup> MacDonald testimony, April 24, 2013, p. 6584.
- <sup>204</sup> Exhibit 844.
- <sup>205</sup> MacDonald testimony, April 24, 2013, p. 6591.
- <sup>206</sup> MacDonald testimony, April 24, 2013, pp. 6590–6; Exhibit 844, pp. 010, 018–019, photos 11–12.
- <sup>207</sup> Exhibit 844, p. 021.
- <sup>208</sup> MacDonald testimony, April 24, 2013, pp. 6597–8; Exhibit 844, p. 021.
- <sup>209</sup> MacDonald testimony, April 24, 2013, pp. 6602–3.
- <sup>210</sup> MacDonald testimony, April 24, 2013, p. 6607–8.

- <sup>211</sup> MacDonald testimony, April 24, 2013, pp. 6561–2.
- <sup>212</sup> MacDonald testimony, April 24, 2013, pp. 6576–7.
- <sup>213</sup> Bob Nazarian testimony, July 23, 2013, pp. 17600–5; Exhibit 1490, pp. 029, 043–044.
- <sup>214</sup> Bob Nazarian testimony, July 23, 2013, pp. 17589–91; Exhibit 706, p. 2351.
- <sup>215</sup> Kennealy testimony, April 18, 2013, p. 5658.
- <sup>216</sup> Kennealy testimony, April 18, 2013, pp. 5659–60.
- <sup>217</sup> Bob Nazarian testimony, July 30, 2013, pp. 18919–24; Exhibit 706, p. 2351.
- <sup>218</sup> Exhibit 2305.
- <sup>219</sup> Hamilton testimony, July 8, 2013, pp. 14976–9; see also Kennealy testimony, April 18, 2013, p. 5660, and Bob Nazarian testimony, July 23, 2013, pp. 17590–1.
- <sup>220</sup> Farkouh testimony, May 7, 2013, pp. 10085–6.
- <sup>221</sup> Exhibit 8-16.
- <sup>222</sup> Levon Nazarian testimony, July 16, 2013, pp. 16464–6; Exhibit 5362, p. 0285.
- <sup>223</sup> Levon Nazarian testimony, July 16, 2013, pp. 16466–74; Exhibit 5362, pp. 0291–2.
- <sup>224</sup> Bob Nazarian testimony, July 26, 2013, pp. 18558–62; Exhibit 5348.
- <sup>225</sup> Kennealy testimony, April 18, 2013, p. 5725.
- <sup>226</sup> Kennealy testimony, April 18, 2013, p. 5686.
- <sup>227</sup> Kennealy testimony, April 18, 2013, pp. 5686–7.
- <sup>228</sup> Kennealy testimony, April 18, 2013, pp. 5686–7.
- <sup>229</sup> Exhibits 2296 and 706, p. 2348.
- <sup>230</sup> Bob Nazarian testimony, July 29, 2013, p. 18827.
- <sup>231</sup> Exhibit 6184.
- <sup>232</sup> After interest, but before amortization.
- <sup>233</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>234</sup> Levon Nazarian testimony, July 15, 2013, pp. 16200–03.
- <sup>235</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>236</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>237</sup> Purports to reflect the financial performance of Algo Centre Mall, not Eastwood Mall Inc.
- <sup>238</sup> As an example, Exhibit 5955, p. 3.
- <sup>239</sup> Levon Nazarian testimony, July 15, 2013, p. 16179.
- <sup>240</sup> Levon Nazarian testimony, July 15, 2013, pp. 16197–8.
- <sup>241</sup> Bob Nazarian testimony, July 23, 2013, p. 17452.
- <sup>242</sup> Levon Nazarian testimony, July 15, 2013, p. 16185.
- <sup>243</sup> Exhibit 1250.
- <sup>244</sup> Exhibit 5956.
- <sup>245</sup> Exhibit 5955.
- <sup>246</sup> Exhibit 5952.
- <sup>247</sup> Bob Nazarian testimony, July 23, 2013, pp. 17521–8.
- <sup>248</sup> Levon Nazarian testimony, July 15, 2013, pp. 16205–8.
- <sup>249</sup> Bob Nazarian testimony, July 23, 2013, pp. 17528–33; Exhibit 6185. Bob Nazarian also could not explain the change in Yorkdale Group Inc.'s income tax return for the year ending January 31, 2009, which indicated a net income of \$1,748 for that year and \$6,106,120 for the previous year: Bob Nazarian testimony, July 23, 2013, pp. 17485–8; Exhibit 1694, p. 0016.
- <sup>250</sup> Levon Nazarian testimony, July 15, 2013, pp. 16195–98; Exhibit 6184.
- <sup>251</sup> Bob Nazarian testimony, July 25, 2013, pp. 18100–2; Exhibit 6184.
- <sup>252</sup> Bob Nazarian testimony, July 23, 2013, pp. 17468–72; Exhibits 5359, 6069.
- <sup>253</sup> Exhibit 1683, pp. 0015–16; Bob Nazarian testimony, July 23, 2013, pp. 17462–3.
- <sup>254</sup> Exhibit 1683, p. 0019; Bob Nazarian testimony, July 23, 2013, pp. 17463–4.
- <sup>255</sup> Exhibit 1683, p. 0024.
- <sup>256</sup> Bob Nazarian testimony, July 23, 2013, pp. 17460–7.
- <sup>257</sup> Exhibit 1683, p. 0024.
- <sup>258</sup> Bob Nazarian testimony, July 23, 2014, pp. 17464–7.
- <sup>259</sup> Exhibit 6069.
- <sup>260</sup> Exhibit 5957.
- <sup>261</sup> Exhibit 3801.
- <sup>262</sup> Levon Nazarian testimony, July 15, 2013, pp. 16355–7.
- <sup>263</sup> Bob Nazarian testimony, July 25, 2013, pp. 18253–5.
- <sup>264</sup> Exhibit 5584; Exhibit 5956.
- <sup>265</sup> Exhibit 5571.
- <sup>266</sup> Bob Nazarian testimony, July 26, 2013, pp. 18346–7; Levon Nazarian testimony, July 16, 2013, pp. 16518–30.
- <sup>267</sup> Bob Nazarian testimony, July 30, 2013, pp. 18968–70.
- <sup>268</sup> Exhibit 5692.
- <sup>269</sup> Exhibits 4844 and 6183 (two copies of the same email).
- <sup>270</sup> Exhibit 1250.
- <sup>271</sup> Fabris testimony, July 11, 2013, pp. 15724–5.
- <sup>272</sup> Bob Nazarian testimony, July 23, 2013, p. 17538.
- <sup>273</sup> Bob Nazarian testimony, July 23, 2013, p. 17540.
- <sup>274</sup> Exhibit 5638.
- <sup>275</sup> Exhibit 1497.
- <sup>276</sup> Exhibit 5643.
- <sup>277</sup> Levon Nazarian testimony, July 16, 2013, pp. 16683.
- <sup>278</sup> Levon Nazarian testimony, July 16, 2013, pp. 16680–2.
- <sup>279</sup> Bob Nazarian testimony, July 26, 2013, p. 18463.
- <sup>280</sup> Bob Nazarian testimony, July 26, 2013, pp. 18464–6.
- <sup>281</sup> Levon Nazarian testimony, July 16, 2013, pp. 16687–8.
- <sup>282</sup> Levon Nazarian testimony, July 16, 2013, pp. 16888–90.
- <sup>283</sup> Exhibit 5643, p. 06.
- <sup>284</sup> Levon Nazarian testimony, July 16, 2013, pp. 16889–90.
- <sup>285</sup> Exhibit 5653.
- <sup>286</sup> Fabris testimony, July 11, 2013, pp. 15709–10.
- <sup>287</sup> Bob Nazarian testimony, July 26, 2013, pp. 18470–4.
- <sup>288</sup> Levon Nazarian testimony, July 16, 2013, p. 16702; Bob Nazarian testimony, July 26, 2013, p. 18471.
- <sup>289</sup> Ruling on Confidentiality, January 8, 2013, Part Two, Appendix M.2.
- <sup>290</sup> Bob Nazarian testimony, July 23, 2013, pp. 17431, 17502.
- <sup>291</sup> Exhibit 6067.
- <sup>292</sup> Levon Nazarian testimony, July 15, 2013, p. 16161; Bob Nazarian testimony, July 23, 2013, p. 17433.
- <sup>293</sup> Levon Nazarian testimony, July 15, 2013, pp. 16173–4.
- <sup>294</sup> Bob Nazarian testimony, July 23, 2013, pp. 17447–8.
- <sup>295</sup> Bob Nazarian testimony, July 23, 2013, p. 17448.
- <sup>296</sup> Bob Nazarian testimony, July 25, 2013, p. 18265.



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## 2005–6: In the first year of Eastwood ownership, the leaks continue and the City remains inactive

### August 2005–September 2006: Bob Nazarian knows the leaks are serious but does nothing to fix them

Shortly after he purchased the Mall in August 2005, Bob Nazarian knew it had a serious problem with leaks from its rooftop parking deck. He testified: “The leak was my main concern, my nightmare right from the day that we have purchased.”<sup>1</sup> He also testified that, in 2005, there were leaks in the Library, in Zellers, in the food court, “and maybe some other places.”<sup>2</sup> He said he knew from the beginning that the leaks were caused by cars “driving fast over the roof, creating vibration and opening crack[s] between the joints.”<sup>3</sup>

He testified that a few months after the purchase he met with Richard Kennealy, general manager of Retirement Living, and Rhona Guertin, its finance and business development manager, to complain about the leaks. He said he was “laughed at” and belittled and told that the maintenance workers who had worked for Retirement Living and continued to work for Eastwood knew how to deal with the problem.<sup>4</sup> Mr. Kennealy confirmed that he had told Bob Nazarian to rely on the maintenance workers, although his evidence was that this conversation took place before Eastwood had purchased the Mall.<sup>5</sup>

Ray LeBlanc and Al LaBreche, two maintenance workers who had been employed at the Mall for a number of years (along with Ken Snow, the maintenance supervisor at the Mall from 1989 until 2005, shortly after the purchase by Eastwood),<sup>6</sup> continued to repair the leaks as they had always done. They opened the cracks where earlier repairs were peeling, cleaned the cracks, and then sealed and caulked them. Bob Nazarian testified that he had done research to determine the best material to use and purchased a product called THC-900 Dymonic. He directed the workers to put a thin layer of polyurethane on the bottom of the joint and fill it with that material. He agreed that, other than using this new product, the workers did nothing in 2005 or 2006 that was different from what had been done in previous years.<sup>7</sup>

Judy McCulloch, manager of customer service at Scotiabank in the Mall, testified that, after Eastwood’s purchase of the building, the leaks increased greatly and the mould problems were worse.<sup>8</sup> Barbara Fazekas, who retired as chief librarian early in June 2006, testified that things did not improve during the year before her retirement.<sup>9</sup> In the spring of 2006, the leaks produced significant complaints from tenants. A meeting of tenants, attended by Dan Bouffard, the Mall manager, was held on May 17, 2006. The meeting minutes record the following comments:

All merchants who were at the meeting agreed, the mall has deteriorated since new ownership. The suggestion made by tenants was to write the landlord (Mr. Nazarian), and inform him of how unhappy they all are. All agreed to write a letter.

...

Sue Morin (library): the smell of mold in the library is so strong that her customers are leaving. They have had to cover their books with plastic to keep the leaks from damaging their books.

Dan: It was brought to Mr. Nazarian’s attention. Personally he would like to see the area isolated. He would need to resurface the whole parking lot. It is not convenient to reduce parking.

Roger (Zellers) also stated that he has to put plastic covers over the pet food isle [*sic*] to stop the water from damaging his stock.

He would like to know when it is getting fixed. And who is paying for replacing the [ceiling] tiles? As is Doug from Dollarama (asked to state this for him prior to meeting).



Dan explained that the roof has been neglected for over a year. It will cost big money and take a lot of time to bring it back to a state where our maintenance staff is capable of performing routine maintenance.

Both Sue Morin from the library and Brian Knight from Marvel Travel stated it would not be a problem to get out of their lease due to the poor condition of the building. All they would have to do is call the health board on the mold issue and they would close us down.<sup>10</sup>

Bob Nazarian admitted that he knew there were leaks in the Library at the time. He also admitted that he knew there was a problem with leaks in Zellers and that it was “possible” he knew plastic had to be used in both Zellers and the Library to protect stock and books. He agreed that he wanted to resurface the entire parking lot to deal with the leaks. Despite this awareness, however, he simply persisted with the procedure used in the past to maintain the roof.<sup>11</sup>

On June 1, 2006, the Bank of Nova Scotia sent Bob Nazarian a letter referring to a recent meeting in which “we discussed ... how you will be making improvements to the parking garage to stop the water penetration into our Premises.” The letter proposed the following term for a new lease, which Bob Nazarian accepted:

The Landlord covenants to repair or modify at its cost and expense the parking garage’s paving and expansion joints above the Tenant’s Premises to prevent moisture from entering the Tenant’s Premises. The Landlord covenants and agrees to pay for all reasonable costs resulting from moisture penetrating into the Premises ... Should the Landlord fail to pay for an invoice supplied to them ... the Tenant can at its option deduct the invoice amount from its rent coming due under the Lease.<sup>12</sup>

Such a clause is very unusual in a commercial lease, as Bob Nazarian admitted. He testified that he agreed to it because he realized that the leaks were so serious that he was prepared to take this step to keep the bank in the Mall.<sup>13</sup>

In July 2006, Tom Turner was hired to replace Dan Bouffard as the Mall manager. He is a former member of the Royal Canadian Mounted Police and had been employed as an investigator by the Ontario Securities Commission. He has been an officer in the Royal Canadian Navy Reserve for 16 years and at present holds the commission of lieutenant-commander. He gave his evidence in a very straightforward manner.<sup>14</sup>

Mr. Turner had lived in Elliot Lake for about 10 years before he started to work at the Mall, and he was aware of its history of leaks, particularly at the Library and Zellers, having seen stained ceiling tiles and the use of buckets and tarps. He had no experience in running a mall before Bob Nazarian hired him. He had no idea of the extent of the problem at that time. When he started, the maintenance workers told him they dealt with each leak by identifying where it was coming from, removing caulking from the roof in that area, trying to dry it out, and then replacing the caulking. Mr. Turner agreed that this process was reactive; nothing pro-active was being done to address the leaks. When he started, Bob Nazarian gave him no advice about how to deal with the roof.<sup>15</sup>

Mr. Turner testified that the roof became an issue soon after he began at the Mall when heavy rains caused leaks in numerous locations. He had telephone conversations with Bob Nazarian “pretty much daily” about the leak situation. Mr. Nazarian’s advice was “just to get the guys up on the roof and plug the holes.” The workers doing this task were Mall employees. Mr. Turner understood that this process continued the practice that had been in place for years.<sup>16</sup> On July 27, 2006, less than two weeks after he started, Mr. Turner emailed Bob Nazarian, telling him that heavy rain had caused problems “again” at the Library, but that the Eastwood crew had been able to bring it under control and repair it.<sup>17</sup>

Brian England is a certified technical representative, a designation given by Construction Specifications Canada to persons who represent construction products in the marketplace. He is not an engineer or an architect. He had experience before 2000 as a representative of Dow Corning, a large sealant manufacturer. He described his job with Corning as both making suggestions to engineers and architects on products to be used on their projects

and giving advice on joint details and the application of the product.<sup>18</sup> Mr. Turner introduced Mr. England to Bob Nazarian in an attempt to deal with the roof problem. He had met Mr. England through friends and learned that he had a background in the construction industry. Mr. England suggested to Mr. Turner that the problems could be resolved by using a silicone product instead of the urethane used up to that time. The urethane product was failing regularly and was in all the joints. Mr. England's plan was to replace the weak areas first and, as time and money allowed, to replace the rest of the roof joints.<sup>19</sup>

On August 8, 2006, three weeks after he began to work as the Mall manager, Mr. Turner wrote to Bob Nazarian about a number of issues, including the roof. He told him:

[W]hile I love the idea of a tent over the roof, I am sure it would be incredibly expensive. Last week I had a retired executive with Dow-Corning look at the overhead parking. He told me that there is a solution and it involves using silicone instead of urethane.<sup>20</sup>

Mr. Nazarian explained the reference to a "tent over the roof":

I was looking for a permanent solution. I could see that by caulking is not getting fixed up. By that time, I was looking for another channel to stop this leak, which was really getting into our life.

So I thought maybe – as you have seen this, balloons that they are making for golf players and as well as Sherway Mall has some kind of tent on top of the mall, I thought maybe we could do that.<sup>21</sup>

After he spoke to the managers at Sherway Mall in Toronto, however, he concluded that the tent solution would be too expensive.<sup>22</sup>

On August 15, 2006, Mr. Turner sent a memo to Bob Nazarian, advising him that he was researching the new product and working on a budget. He told him there were factors that create a "bit of urgency here" and wrote:

- The lease for the library is coming up for renewal. The library wishes to expand its area and is interested in renting the 2,000 sq. ft. behind Miscellaneous Fashions and the empty store next to it. However, the employees there (all civil servants) filed a complaint with their Health & Safety Committee last year regarding mildew and mold they believe is caused by the leaking roof. The Committee took the complaint to their employer, the City of Elliot Lake, and demanded action to correct the situation or have the library moved. I have reason to believe that we can expect to hear from the City in the near future.
- The Bank of Nova Scotia has sent an Addendum to Lease (renewal to 2011) and I have forwarded this to you. Please note paragraphs 4 "Environmental Representations" and 7 Damage to Leased Premises. You may want your lawyers to review these paragraphs as the Bank is requiring us to "*repair or modify the paving and expansion joints*" on the parking deck and to pay for any damages resulting from leaks. The Branch Manager has told me that they are concerned with water damage and mildew as the Bank is planning to replace all its carpet and bring in new furniture.<sup>23</sup> [Emphasis in original]

Bob Nazarian recalled receiving this memo. He said it gave him great concern, because the leaks were not improving despite the efforts he had made over the previous year. He testified that he knew the leaks were getting worse and, although he did not know what was causing them, he presumed the reason was that his employees were not doing a proper job. He did not, however, consider hiring a professional to give him advice about the problem. He had no explanation other than to say that he thought he could do it without an engineer and, to repeat, that he thought the problem stemmed from his employees' work performance.<sup>24</sup>

Mr. Turner testified that as Mall manager he had access to the revenues and most of the expenses of the Mall. Although he acknowledged he could not provide a completely accurate figure, he estimated that Eastwood was earning approximately \$1 million a year while he was manager.<sup>25</sup> Mr. Turner also testified that he was asked to manipulate the Mall's books within the first two months of becoming manager. Eastwood was seeking refinancing, and Bob Nazarian asked him to leave on the rent roll a couple of tenants who had vacated their

premises and were no longer paying rent. The purpose, Mr. Turner understood, was to enhance the apparent income of the business. Mr. Turner spoke with Sam Hurmizi, Eastwood's accountant, and told him he would not do it – that if there was going to be any manipulating it would be Mr. Hurzimi making the adjustments, not Mr. Turner. Mr. Hurmizi said he would speak to Bob Nazarian.<sup>26</sup>

Although Mr. Nazarian did not retain professional consultants to give him advice about how to fix the roof, he was interested in selling the Mall at an early stage. Less than a month after Mr. Turner sent his memo, he again wrote to Mr. Nazarian, telling him that an individual had come to the Mall saying that he understood it might be for sale:

As you had told me everything is for sale at the right price, I took him for a quick tour and told him about its great potential. After that I gave him your number and asked him to deal with you direct. My opinion is that he is legitimate and represents serious investors.<sup>27</sup>

Bob Nazarian recalled speaking to this individual and acknowledged he had told Mr. Turner that everything was for sale for the right price. Indeed, as Bob Nazarian testified and as the evidence disclosed, he continued to offer the Mall for sale right up until the day of the collapse.<sup>28</sup>

Mr. Turner testified that, despite asking Bob Nazarian for his long-term vision for the Mall,

I never did succeed in getting his vision of where we're going. Whether it was to pretty up the mall and sell it or to fill it and run it forever. I never did have a clear idea as to where we were going.<sup>29</sup>

On September 6, 2006, Mr. Turner met with the Mall's tenants. Bob Nazarian was not present. Notes taken at the meeting show that Mr. Turner explained the repairs to the roof that were planned. The notes state:

Explanation of repairs – cement.

Silka to be fixing the old cement over Zellers, work to be continued till end of October. Projection of goal for this year: Zellers, Bank of Nova Scotia, lighthouse, Dollarama, and the food court.

...

This project will cost approximately \$50,000 plus GST plus the equipment and labour. Our estimated cost will be \$150,000. This project is headed by Brian England, who is knowledgeable in this field. Due to the guarantee for the product, we had to hire someone so the warrantee would be fulfilled.

...

Due to us doing the work (Brian England) they are guarantying the product.<sup>30</sup>

Mr. Turner acknowledged making the statements attributed to him in the memo, but testified that, "as it turned out, I'm not sure about the warranty."<sup>31</sup> Bob Nazarian admitted that there was no warranty on the work because Eastwood was using its own employees rather than the manufacturer's to do the work. He purported not to know that the tenants were being told there was a warranty.<sup>32</sup> In light of my general conclusions about Mr. Nazarian's credibility, one might be justified in suspecting that he did know.

Mr. Turner testified that the new product was applied in the summer of 2006 to the areas considered most urgent, replacing the caulking with the silicone product. Casual staff was hired to assist with the work. The new product was applied so that it sat below the surface of the roof to prevent the car tires from picking it up. The planned work was not completed by the time the weather required it to be stopped in the fall. The following spring, Bob Nazarian told him that the new product was too expensive and to return to applying the product that had been used by Retirement Living. I accept this evidence.<sup>33</sup>



## September 2005–July 2006: City officials know they can require repairs to deficient properties but do not do so

In September 2005, Troy Speck, the City's chief administrative officer, recommended to council that the City begin pro-active inspections of some multi-residential and commercial properties. This suggestion was made because of a recurring problem of substandard properties seized by the City for unpaid taxes being sold without adequate repairs. On September 7, 2005, he reported to council:

The Building Code Act, the Fire Code and the Property Standards By-Law all contain provisions allowing Inspectors to enter and inspect premises, issue orders for work to be done to bring properties into compliance, and for charges to be laid where there is a failure of compliance. There are also provisions allowing the municipality to perform remedial work and charge the cost against the property, to be collected as taxes.<sup>34</sup>

On November 15, 2005, Syl Allard, the chief building official and property standards officer, reported to council on the same issue. He noted that, under the policy enacted in 1995, enforcement of the Property Standards By-law was "complaint-driven" and that the City had the option, if necessary repairs were not made after an order had been issued, to repair the property itself and charge the cost back to the property owner as taxes. He recommended that the enforcement policy for commercial property or residential buildings with more than three units be changed to allow an inspection of vacant properties or properties with a vacancy rate of 50 percent or more. He recommended that all such buildings be inspected for visually evident deficiencies which would "affect the structure or building integrity." In addition, he recommended that the inspections be limited to specified sections of the by-law, including section 2, entitled "Structural Capacity;" and section 5.1, entitled "Roofs." Leslie Sprague, the City clerk, and Mr. Speck approved his report.<sup>35</sup> On January 19, 2006, City Council accepted the recommendation in principle and referred the matter to the budget committee and the personnel committee.<sup>36</sup>

Mr. Allard's report also noted that "occupied buildings would be self-governing by tenancy complaints and therefore the current service level approach could continue."<sup>37</sup> Both Mr. Speck and George Farkouh, the mayor at the time, testified that this clause meant that council had decided to enact the proactive program only for buildings that were at least partly vacant. The councillors had concluded that the City could rely on tenants' complaints to ensure enforcement of the Property Standards By-law for occupied buildings. As Mr. Farkouh testified, if a tenant complained, the property standards officer would investigate, inspect, and bring about whatever remedy was appropriate.<sup>38</sup>

On July 24, 2006, City Council formally approved the new policy in accordance with a report signed by Ms. Sprague and approved by Mr. Speck. This report reminded council again that the existing policy for enforcement of the Property Standards By-law for non-vacant buildings, which was complaint-driven, would continue in force.<sup>39</sup>

According to Mr. Allard's testimony, complaint-driven enforcement meant that, before he could act, he required a communication, identified as a complaint, that conditions which were a breach of the by-law existed at a building. The complaint had to be brought to the direct attention of the Building Department, not any other department of the City, and the complainant had to explain how he or she expected the municipality to react. Mr. Allard said he would not do anything if someone came in and told him, for example, that a roof was leaking into his store. That, he testified, would not be a complaint, just a "transmission of information." He held to this view even though he knew that water infiltrating a building – especially chloride-laden water dripping from vehicles – could, over time, cause structural damage. Furthermore, he explained that he himself could not be the complainant. Unless he saw evidence of an obviously unsafe condition, he would not be able to act on his own; he needed a complaint from someone else.<sup>40</sup>

Given the number of times this issue had been before City Council following reports by staff, it must have been, at a minimum, clear to any councillor, the mayor, the City clerk, the chief building officer, and Mr. Speck that

- the Property Standards By-law required that buildings have structural integrity;
- if a building was in breach of the by-law, repairs could be ordered by the City's property standards officer and, if not made, could be carried out by the City, with the cost being charged to the owner in the same way as taxes;
- commercial buildings such as the Mall which were more than 50 percent occupied would not be inspected by City staff unless a complaint was received; and
- the provisions of the Property Standards By-law – such as the requirement that buildings be structurally sound and watertight – were designed to ensure public safety. The City's confidence in these provisions relied on the assumptions:
  - that tenants would complain to the City about buildings which were not in compliance with the Property Standards By-law; and
  - that, if such complaints were received, the City's property standards officers would investigate and make whatever orders were required.

One might expect that this collective understanding on the part of the City's leaders would have made City officials more responsive to such complaints. The evidence shows, however, that in the first year of Eastwood's ownership, that was not so.

## **The City receives complaints about leaks at the Mall and does nothing**

I heard from a series of witnesses who were employees or officeholders of the City of Elliot Lake during the first year that Eastwood owned the Mall. They testified they were

- unaware of leaks at the Mall;
- unaware that the City could require that leaks and any other defects be remedied;
- unable to act despite knowing that a tenant had reported persistent leaks to the City in writing; or
- had failed to consider whether any such action could be taken.

I also heard evidence that responsible City officials tried to discourage attempts to resolve the situation.

## **August–December 2005: Chief administrative officer ignores concerns about ongoing leaks from the Library and the Joint Health and Safety Committee**

On August 11, 2005, there was a meeting of the City's Joint Health and Safety Committee, established pursuant to the *Ontario Health and Safety Act*. The committee received an update about the employer's response to its recommendations about the leaks in the Library. The committee was advised that there had been new leaks, and that buckets had been put out and ceiling tiles removed. The minutes of the meeting noted that the employer's response was "still outstanding" and that Ms. Fazekas was to meet with the new landlord in the fall.<sup>41</sup> Mr. Speck testified that he had probably received a copy of these minutes and noted that, contrary to his earlier belief, the leaks "obviously" had not been fixed.<sup>42</sup>

On December 15, 2005, the leaks at the Library had become such a regular occurrence that the chief librarian issued an instruction to staff setting out a daily procedure for dealing with them. It listed 16 steps to be taken, including checking for leaks every morning using a prescribed checklist of potential locations; cordoning off areas of leaks that could involve electrical issues; covering books, tapes, or computers that might be damaged with tarps (using a supply of plastic kept on hand); arranging drip buckets “to catch as much water as possible”; shielding affected areas with tarps hanging from the ceiling; recording all damage; and mopping with a wet vacuum. The document included a note that, if Library patrons complained about the procedures, they should be given a brochure with the names of the members of the Library board, the mayor, and members of council.<sup>43</sup> Mr. Speck testified that he was aware that this procedure had been put in place in response to one of the recommendations from the Joint Health and Safety Committee.<sup>44</sup>

When asked what steps he took, in light of this information, to see whether the leaks were being fixed, Mr. Speck stated that he left the matter in the hands of the Library and the Joint Health and Safety Committee to monitor.<sup>45</sup> Given that the Library had clearly been unable to have the problem resolved on its own, and the committee’s role was limited to recommendations to management, this response amounted to doing nothing.

### **June 2006: Councillor McTaggart warns against involving council, while mayor, councillors, and chief administrative officer ignore complaints**

On June 8, 2006, after the May 17 meeting of the Mall merchants described above, Councillor Cathy McTaggart, who had been appointed to the Library board by council, sent a copy of that meeting’s minutes (which detailed tenants’ complaints about leaks and mould, the use of tarps to protect books and stock, and the Mall manager’s comment that it would cost “big bucks” to fix) to Mayor Farkouh, all members of council, Dennis Kukoraitis, the City treasurer, Ms. Sprague, and Mr. Speck. She wrote in the accompanying email:

The reason why I am passing these documents on to you is because they contain information about the obvious opinions from the various merchants in attendance at the meeting that “the mall has deteriorated since new ownership.” “The mall is now dirty compared to before”.

I am the Council representative on the Library Board and we held our Library Board meeting this evening. One of the Issues discussed was the ongoing problems that the Library and all merchants are experiencing with the Algo Centre Mall.

... Council is going to have to deal with this problem because we are going to start to get complaints.<sup>46</sup>

The next day, Scott Reinhardt, a member of council, responded to Ms. McTaggart, writing: “I would encourage you to not embroil council in mall problems in any way. Either as an individual councillor or as a member of the library committee.”<sup>47</sup>

Ms. McTaggart responded on June 10, copying all the recipients of her original email:

I did not intend to give the impression that I would “embroil” council in mall problems in any way. I merely tried to provide Council with a “heads up” and point out that, it is my personal impression that in the very near future, this Issue is going to be brought to the attention of the Municipal Government (Council) by either disgruntled Mall Merchants or disgruntled citizens (taxpayers), or both, and I do not believe that it is something that Council will be able to ignore, shrug off or avoid. I think that Council is going to be asked to go to bat (step up to the plate) as it were, for these people, which includes our own Library ... What do you suggest? Just tell everybody, if they do not like the way they are being treated by Eastwood Mall Inc., then move out. Pretty soon, we will see an empty Mall, which used to be a concern to City Council when Nordev owned the property. Now that Eastwood Mall Inc. owns the property, has the attitude of Council towards the condition of the Mall suddenly changed? The City does write the rent cheque every month to Eastwood Mall Inc. for \$8,054.16 for the Library (\$92,649.92/yr.) does everyone believe that the City and the Library is receiving value for the money that is being spent?



I felt that as the Council appointed representative on the Library Board, it was my duty to report to Council the latest information that I had about the Landlord of the Library ... You read the Notes that I provided all of you from the meeting. Given the current "mindset" of the new mall owner, which seems to be "the bottom line and profit at any cost" it does not look like the cleanliness or security of the Mall is a top priority.

The leaks from the ceiling tiles have been an ongoing problem for years and the new owners know very well that they have inherited this ongoing problem. Perhaps they see the Mall as a great write-off (loss) for tax purposes. I still have a beautiful CD, which happens to have been burned by Dan Gagnon, [director of project tourism and leisure], at City Hall in March 2005 because I borrowed the City Hall digital camera to take photos of the damage to the Library. (some of these photos are attachments.) Is this any way to run a Library? Now, it isn't just leaking ceiling tiles. Now it is cleanliness and security ...

I wonder how Nordev feels about this whole situation?

I would really appreciate hearing comments from other members of Council.<sup>48</sup>

The day before Ms. McTaggart's response was sent, there had been more significant water damage at the Library. Suzanne Morin, who replaced Ms. Fazekas as chief librarian in June 2006, sent Ms. McTaggart an email on June 12 which stated:

[J]ust wanted to keep you posted on the roof situation at the library. You mentioned at the board meeting that you would be talking to the Mayor and Council regarding the Merchants and Tenants meeting minutes and my letter to them as well. I thought you can add the following:

Wanted to let you know that we had quite a mess here on Friday, June 9<sup>th</sup> morning with the rain on Thursday evening. I arrived at work to find collapsed wet tiles, water dripping from the new light ballast which I had just had replaced the day before by a paid electrician, and water dripping from most of the prominent leaky areas. I immediately picked up the phone to call the Mall office. I asked Corrine the exec. assistant to send the mall mgr. to have a look at this situation before the maintenance crew cleans it up. Dan Bouffard (mall mgr.) along with Al from mtce. arrived at approx. 9:25 am and inspected the situation. Mr. Bouffard agreed with me that this situation has to be addressed immediately. He did say that they had a company lined up to fix the problem but the day before the work was to start the contractor backed out saying it was out of their expertise. Anyhow, he did say he would address the problem right away and find someone to temporarily fix the problem this weekend or early this morning. Again, this will only be a temp. fix until they find a contractor who is willing to take this job on.<sup>49</sup>

Ms. McTaggart forwarded this email to Mr. Reinhardt, copying it and her response to Mayor Farkouh, all members of council, and Mr. Speck. She wrote:

In response to your e-mail reply of this morning, Sue Morin sent the e-mail below to me this morning before you sent yours and I am passing it on to Council, as requested by Sue.

Your question was "are you sure that the merchants association minutes should have been circulated?" My response is that at the meeting of the Library Board between 5:00 p.m. and 6:15 p.m. June 8th, the whole Library Board was in agreement with me passing on the "Notes" that were taken at the Mall Merchants Meeting. It is their feeling that Council should know about this situation, and that perhaps this will help get something done about it.

If you recall, last Thursday evening, June 8th, we had quite a storm and here is the resulting e-mail regarding the damage to the Library. Scot, I guess all you have to do is walk across the hall and take a look at the damage. Perhaps you have already done this today.

I am curious to know if there was damage to other Tenants ceilings, such as Zellers, and I will find this out from Sue.

With regard to the cleanliness, I have been told personally by a maintenance staff worker that the mall maintenance staff was cut back soon after Eastwood Mall Inc. bought the mall, and that the maintenance staff remaining had their hourly wage reduced, while at the same time they are working longer hours. They are not happy campers. This happened around the same time that Marcel Leblanc was relieved of his duties.

I will not be writing any more emails to you about this situation unless there is something that you should be notified about because it could become a full time job.<sup>50</sup>

No City official took any action after this series of emails alerted the mayor, council, and senior staff of the continuing problems with leaks at the Mall, contrary to the Property Standards By-law. Mr. Farkouh initially denied having seen the emails at all. He testified that he was on vacation from early June to early July 2006 and did not get these emails while he was out of the country. His authority as mayor passed, in his absence, to the deputy mayor, Councillor Richard Hamilton (subsequently the mayor). Mr. Farkouh at first testified that he was not advised of the emails or their issues when he returned,<sup>51</sup> but subsequently he said he would have reviewed the emails and would have asked the chief administrative officer to let him know what this correspondence was all about. He could not, however, recall the outcome of that discussion.<sup>52</sup>

**No City official took any action after this series of emails alerted the mayor, council, and senior staff of the continuing problems with leaks at the Mall, contrary to the Property Standards By-law.**

Mr. Hamilton remembered reading the emails at the time. He disagreed with Councillor Reinhardt's views that Councillor McTaggart ought not to "embroil" council in Mall issues in any way and said it was a good idea for her to tell council about these matters. He testified that the emails were complaints that the Mall was not watertight within the meaning of the Property Standards By-law and the City's complaint-driven enforcement policy. His evidence, however, was that, despite Councillor McTaggart's concerns, the issues were not discussed at council either formally or informally. He noted that senior staff had been copied on the emails and said he expected Mr. Speck to refer them to Mr. Allard. Although he agreed it was council's role to ensure that City staff were adequately performing their responsibilities, he testified that council did nothing to see that staff did deal with this issue, just as council had done nothing since Councillor McTaggart raised the issue of leaks with Councillor Don Denley in April 2004.<sup>53</sup>

Mr. Speck testified that he did nothing to deal with the problems outlined in the emails. He did not consider whether an order could be issued under the Property Standards By-law, even though he, together with Mr. Allard and Ms. Sprague, were in the midst of having council revise the policy for enforcing the by-law.<sup>54</sup> Mr. Speck admitted he could think of only three things the City could do to deal with the leaks at the Library – find alternative space for it, exert pressure on the landlord to fix the leaks, or have the chief building official inspect the Library and decide whether to issue an order under the Property Standards By-law. The first two options had not succeeded during his term at the City. He admitted that, if he had sent these emails on to Mr. Allard, they would have given him the basis to begin an investigation under the Property Standards By-law. But he did not do so.<sup>55</sup>

Ms. Sprague was also asked about these emails. She testified that it was common knowledge that there were leaks at the Mall and particularly at the Library; as she put it, "everyone would have been generally aware of the leaks."<sup>56</sup> She took no action when she was copied on the emails to and from Councillor McTaggart; she noted that they were also copied to members of council, so that it was a "political discussion" and not one in which the clerk's office would have been involved.<sup>57</sup> She did not view the emails as complaints within the meaning of the Property Standards By-law; she said, "it wouldn't have occurred to anyone that this is a complaint. It is a discussion about the issues at the Mall and the Library."<sup>58</sup>

The evidence makes it clear that there was little supervision of the chief building official, who was also the property standards officer for the City. Mr. Speck testified that in 2003 he had recommended, and council had approved, a change in the reporting relationship so that the chief building official, who had reported to him as the chief administrative officer, would report to the City clerk. Before that change, Mr. Speck said that he would not tell the chief building official what he could or could not do, but that he would be

sitting with him on a regular basis, understanding what challenges that he might be facing, whether they be in terms of particular issues or finances or personnel. So that we could work together towards solutions to any issues like that and that I would be able to advocate on his behalf with Council ...<sup>59</sup>

Mr. Allard testified that Ms. Sprague, the City clerk, was his immediate supervisor in 2006 as chief building official.<sup>60</sup> Ms. Sprague, however, testified that the chief building official does not report directly to her; she does not meet with him regularly, and he does not keep her apprised of what is going on in the Building Department. Although she has conducted performance appraisals for the chief building official, including Mr. Allard, it appeared from her evidence that she was not able to deal with the substantive aspects of his performance.<sup>61</sup> It may be that this lack of structure contributed to Mr. Allard's failure to properly deal with the issues at the Mall, as described here and below.

Mr. Allard testified that, between 2002 and the summer of 2006, he had been in the Mall at least once a week, visiting a number of stores and, on one occasion, the Library. He testified that the only evidence he saw of leaks during that period was one garbage pail placed to collect drips close to the food court area. This evidence did not make him curious about the condition of the Mall and, he testified, even if it had, he would not have been able to investigate without a complaint.<sup>62</sup>

Nor, according to his evidence, did Mr. Allard receive copies of the email of June 12, 2006 from Councillor McTaggart to the mayor, all members of council, and Mr. Speck describing the serious water damage to the Library which had occurred the previous weekend. Although his office was on the second floor of city hall – directly across the hall from Mr. Speck's office, down the hall from the councillors' offices, and one floor above Ms. Sprague's office – he never had a conversation before June 2006 about leaks from the Mall roof.<sup>63</sup>

Chris Clouthier echoed Mr. Allard's evidence. He began to work as a building inspector for the City on September 7, 2004. He testified that, before October 2006, he was unaware that there were any leaks in the Mall; he was not sent any correspondence, emails, or letters regarding any such leaks. Nor was he aware that the Library had suffered very bad leaks in April and May 2005.<sup>64</sup>

### **August 2006: Council and the property standards officer are advised that the leaks are ongoing, but they do nothing**

On August 25, 2006, Suzanne Morin, by then the chief librarian, emailed the members of the Library board, including Councillor McTaggart. She wrote:

I wanted to keep you all posted on the discussions I have had with the new Mall Manager, Tom Turner. Tom has been in to see me several times in the last few weeks to let me know that they will be testing a new sealant product from Dell Corning ... Tom anticipates the work to be completed by the beginning of October. I'm very hopeful that this will be the solution we've been looking for.<sup>65</sup>

Ms. McTaggart forwarded this email the same day to Mayor Farkouh, all members of council, Mr. Kukoraitis (the acting chief administrative officer after Mr. Speck left the City's employ), Ms. Sprague, Mr. Allard, and other City staff. She wrote: "I am forwarding this e-mail from Sue Morin, Chief Librarian, for your information. I like to keep everyone posted on the situation with the ongoing 'Leaky roof' at the Algo Mall."<sup>66</sup>



Mr. Farkouh recalled receiving that email. He acknowledged that, by that date, he was aware that serious leaks at the Library had been a problem for the entire time it had occupied that space; that they had resulted in complaints to the Joint Health and Safety Committee, which had recommended that the leaks be stopped; that there had been testing and that mould had been found; and that the leaks continued – and that council was aware of them. His evidence was that, despite this knowledge, no one in authority did anything about the problem. In a rambling and confusing set of answers to Commission counsel, he seemed to say that, although he knew that the Property Standards By-law allowed the City to issue an order to have the property fixed, and he knew that, if such an order were disregarded, the City could fix the problem itself and recover the costs from the owner, he had not directed his mind to the issue.<sup>67</sup>

Mr. Allard also recalled receiving this email. His evidence was that this message constituted the first time he had heard of leaks in the Library:

I reviewed the communications as information, and didn't discuss it. I didn't investigate it further.  
I received it, essentially, is the approach I took.<sup>68</sup>

He testified that he never spoke to anyone about it. He specifically denied being told by anyone not to get involved. He said that, if he had investigated and found that the roof was very leaky and that there was structural deterioration in the building, he would have taken some action. The only reason he could give for not investigating is that he did not treat this information as a complaint.<sup>69</sup>

Mr. Clouthier did not see this email. He testified that a building permit may or may not have been required to start the repairs, depending on their exact nature. It was his evidence that, if the workers were just sealing surface cracks with silicone or caulking, it was questionable whether a permit was necessary. If, however, they were trying to seal a lot of leaks over a large roof area, it would have to be done in a different way, would need engineers and architects, and would require a permit. It was his evidence that, had he seen the email, he would have wanted to know exactly what the Mall owners were doing up on the roof.<sup>70</sup>

## October 2006 Notice of Violation: The first official City action

On October 10, 2006, Tom Derreck began his duties as the City's chief administrative officer, replacing Mr. Kukoraitis, who had been acting chief administrative officer since Mr. Speck's departure on July 26. Mr. Derreck has diplomas in public and municipal administration from, among other institutions, Queen's University, the University of Western Ontario, and Fanshawe College. He had previously worked as a town clerk, city clerk, and chief administrative officer for a number of municipalities, including the Town of Fort Erie and the City of St. Catharines. He had also worked for six years as a local government adviser in the Ontario Ministry of Municipal Affairs and Housing, providing advice to both municipalities and individuals within the ministry about the application of provincial legislation and regulations in municipalities.<sup>71</sup>

Mr. Derreck explained that it was normal for the chief administrative officer to work closely with the mayor and to meet more frequently with the mayor than with other members of council.<sup>72</sup> When he started his employment, Mr. Derreck noticed that the chief building official reported to the City clerk. He had not seen that relationship in other municipalities: he testified that, normally, the building services were attached to and reported to the city engineer or, if there was no engineer, to the chief administrative officer.<sup>73</sup>

## The situation facing Mr. Derreck: More leaks at the Library

Leaks at the Library had come to a head again two weeks before Mr. Derreck took up his position. On September 25, 2006, Ms. Morin emailed all members of the Library board (including Councillor McTaggart) and Daniel Gagnon, who, as director of project tourism and leisure, acted as the liaison between City staff and the Library. She wrote:

Because of the wet weekend we have a wet Library. We had covered the books in the “drip zone” area but unfortunately the books on shelves 2, 3, 4 & 5 have gotten wet (below the top shelf). We have 35 books drying out this morning.

I called on the Mall maintenance to dry vac the wet carpet and asked where they are on the roof with the new product. They are currently working on one seam [sic] ... above the Library. So hopefully, if all goes well, they will have the new product installed above the Library before the weather gets too cold to work with the product.<sup>74</sup>

Mr. Derreck started work on Monday, October 10, 2006. That day, he visited the Mall to acquaint himself with the City, not having lived in Elliot Lake before. He noticed signs of water damage, such as buckets set out to catch leaks, ceiling tiles missing in various areas, stained ceiling tiles, and yellow caution tape cordoning off sections where maintenance work was ongoing. He spoke to merchants and others in the Mall. He quickly learned that the leaks were a long-standing and consistent problem.<sup>75</sup>

A few days later, he met Ms. Morin. She told him the history of the Library’s leaking problem and showed him the shelves covered with tarps, buckets on the floor, missing ceiling tiles, and dehumidifiers. He saw a hose coming from the area above the suspended ceiling and draining water into a bucket. He climbed a ladder into the area directly under the roof and saw water puddled on top of the light fixtures. Some of the light fixtures were not working. She told him that the situation had been like this virtually since the first day the Library moved into the Mall in 1989.<sup>76</sup>

Mr. Derreck was shown photographs of the condition of the Library (see, for example, fig. 1.8.1). He testified that they depicted the Library in a better condition than on the day he saw it with Ms. Morin. On that occasion, it had been raining, and the water was dripping from the ceiling.<sup>77</sup> Mr. Derreck’s immediate reaction was that he did not understand why a library would be in the worst possible environment for books. He was surprised to learn from Ms. Morin that the Library was occupying the premises under a 20-year lease.<sup>78</sup>



**Figure 1.8.1** Conditions in the Library, fall 2006

Source Exhibits 11-64, 11-72

On October 11, 2006, Ms. Morin sent an email to Andrea Leddy, the City's personnel director and co-chair of the Joint Health and Safety Committee, and Tanya-Lee Williams, the City staff member responsible for workplace health and safety, with copies to Councillor McTaggart and Katherine Croxson, the chair of the Library board. She wrote:

[A]s you all know it is raining outside and also inside the library. We did put up tarps and buckets yesterday before leaving for the day. We do not have any damaged books but I have closed off the area most affected by the leaks. I may turn off the lights in that area if water gathers in the diffusers.<sup>79</sup>

On Monday, October 16, 2006, at 12:30 p.m., Ms. Morin sent an email to all members of the Library board, Mr. Derreck, Mr. Gagnon, Ms. Leddy, and Ms. Williams:

I wanted to keep you all informed on what has taken place at the library since Friday. The Library was experiencing leaks in the "drip zone area", French collection area, staff washroom, storage room known as "old swap shop", A/V storage room behind circulation desk, and above the CAP computers.

Tarps had been covering the drip zone area for quite some time and the area most affected had been cordoned off to the public and staff. We had buckets in the aisles to catch the leaks but unfortunately that was still not enough. Water was accumulating on the floor very quickly. We also had 2 air blowers from Quest to help the area.

- 4:00 p.m. called Andrea Leddy (Health & Safety) and Dan Gagnon (Dept. Head) to assess the situation of the library to determine if the library should be closed due to hazardous conditions.
- Andrea Leddy and Dan Gagnon decided that it would be prudent to shut down the library Friday evening for their shift and also Saturday's staff was notified. I contacted all Library Board members to notify them.
- 10:00 a.m. Saturday, Oct. 14th I visited the library with my husband to check on the situation. We noticed that the tarps were starting to form condensation and the books were getting damp. We pulled the tarps away from the books in order the the [sic] air to flow between the books and the tarps.
- 4:00 pm Saturday, Oct. 14th I visited the Library once again to empty the "Drop Box" which was full and I also checked on the situation. It was still leaking quite heavily and I ensured that the books were ok.

I informed Katherine Croxson and we decided to call Bob Stirling from Quest to see if he can have someone take up the water from the floor on Sunday. He confirmed that this was possible at 1pm on Sunday.

- 12:00 noon, Sunday, Oct. 15 I met Katherine Croxson at the library to come up with a plan of action. We decided to move the books from the top and bottom shelves in the drip zone area. Unfortunately, approx. 50 books were damp and they are air drying. The full-time staff were called and they came in to assist with moving the books out of the area. Richard from Quest removed the water from the floor and sprayed a solution to mask the moldy smell. Bob Stirling installed a 3rd air blower. We decided to lift the tarps off of the floor in order for the carpet to dry.

I had the maintenance staff turn off the heat in the Library. The Library has to be kept below 70 degrees F and the humidity has to be below 50% to keep the mold from growing.

- 7:30 p.m. Sunday, I returned to the Library and pulled the tarps down to the floor in case of rain during the night.
- 8:00 a.m. Monday, Oct. 16th arrived at the library to find a very heavy mold smell. Andrea Leddy and Dan Gagnon came to the library at 8:35 a.m. to assess the situation. It was decided to close off all the area other than the non-fiction area, staff office, staff washroom and large print area. The area was closed off. Tom Derreck visited the Library and I gave him a tour of the area with a brief history of the problems. Katherine Croxson also came to the library and we decided that it would be best if she was to visit the new CEO, Tom Derreck.



Bob Stirling came to the Library and did a humidity and temp. test. Temp at 64 F and humidity at 47.6%. Bob did say that the humidity level was very high on the edge of the bookshelves. He will install dehumidifiers and more air blowers later today as they are freed up in different areas of the mall.

... More rain in the forecast for this evening and Tuesday. We will make sure the books are covered and buckets are in place to catch the leaks.

Keeping you all informed.<sup>80</sup>

At 2:42 p.m. that day, Councillor McTaggart responded to Ms. Morin's email, copying the Library board, Mayor Farkouh, all members of council, Mr. Derreck, Ms. Williams, Mr. Gagnon, Ms. Leddy, and Robert deBortoli, who was at that time the City's director of operations. She wrote:

Thank you so much for your e-mail. As you know, Phil and I were at the Library on Friday at around 10 to 5 p.m. when you were busy closing the library down. We observed the awful mess, the water pouring through the ceiling into all of the plastic containers you and your staff had on the floor, and the tarps covering all of the books and the signs you had posted. We felt sick about the whole situation as I know you and your staff do as well. These are definitely extremely unsafe working conditions and a health hazard. We had discussed this problem at our Library Board meeting on Thursday night and, of course, that night, we had an early winter storm which has only made things worse.

**"The thing that I am really worried about is the possibility of the roof caving in with cars parked up there."**

**– Councillor McTaggart**

I myself was at the Mall on Saturday afternoon between 2:15 p.m. and 3:00 p.m. The first place I stopped at was the Library to peek in through the windows. I also observed that the Bank of Nova Scotia has water coming down just inside their sliding doors (if the money starts to get wet, there will be a public outcry)! There are also other stores, as you know, experiencing leaks. *The thing that I am really worried about is the possibility of the roof caving in with cars parked up there.*

*It happened a few years ago at the Station Mall, I think it was, in Sault Ste. Marie, Ontario, but I do not think that they had cars parked on the roof. It could happen here.*<sup>81</sup> [Emphasis added.]

Despite the dire (and prophetic) warning from Councillor McTaggart, Mayor Farkouh did not recall receiving this email. He had no memory of anyone ever raising the possibility of the roof caving in. Nor did he recall receiving, with all members of council, an email the next day from Ms. McTaggart forwarding a report from Ms. Morin that the humidity in the Library had reached an unacceptable level for books. When asked whether he had ever considered the effects of water on the steel that supported the building, given what he knew about how long the leaks had been ongoing, he replied:

**"I didn't really connect the dots, no."**

**– Mayor Farkouh**

"I didn't really connect the dots, no."<sup>82</sup>

## Mr. Derreck takes action

### Preliminary inspection

Mr. Derreck, however, reacted quickly after receiving these emails and visiting the Library himself on October 16. He confirmed that, based on what he saw, the email from Ms. Morin accurately described the conditions. He spoke with Councillor McTaggart and she told him she had been addressing this ongoing problem with various municipal officials, the mayor, and council, without success.<sup>83</sup> He also responded to Ms. McTaggart's email:

I was over at the library this morning and also discussed the matter with Dan G[agnon] this afternoon and am obtaining a copy of the lease agreement from Lesley [Sprague] for a read-over. As you've correctly advised Sue [Morin], I'm a bear when it comes to libraries and will do all that I reasonably can to

advance the health and well-being of ours. Sue mentioned that this long-standing leakage problem has interfered with her ability to im[p]lement various programs and to make the best use of the funds and resources placed under her care. That won't do at all.<sup>84</sup>

Mr. Derreck made a note in his "Business Action Record," a document he updated regularly, dated October 16. Entitled "Library Closing Due to Water Leakage," that note listed eight questions, among them the following: "Who is in charge of the matter & following up?" and "Past occurrences & ongoing problem – Why no resolution?" The note indicated that these issues would be put on the agenda of the next day's management meeting.<sup>85</sup>

Mr. Derreck testified that he went to the Building Department office to see Mr. Allard, and, because Mr. Allard was out of town, he spoke with Mr. Clouthier.<sup>86</sup> Mr. Derreck asked to see the Building Department's file on the Library and the Mall, expecting to find inspection notices or perhaps orders relating to building violations. Mr. Clouthier told him that there were no such records and that he knew nothing about leaks at the Library.<sup>87</sup> This testimony is consistent with Fire Chief Paul Officer's evidence. Chief Officer had been a property standards officer, a building inspector, and then chief building official from 1981 until September 2002.<sup>88</sup> He testified that the Building Department file, which he reviewed, did not contain any property standards complaints from the Mall tenants, employees, or patrons. He did not issue a Property Standards By-law Order against the Mall or the Hotel during his time in those positions.<sup>89</sup>

The testimony is also somewhat consistent with Mr. Allard's evidence, noted above, that the August 25, 2006, email from Councillor McTaggart was the first he had heard of leaks in the Library. He did not treat the message as a complaint and did not investigate it.<sup>90</sup> He was not asked if he put it in the Building Department's file on the Mall; not doing so would be consistent with his practice of not treating it as a complaint.

Mr. Clouthier testified that, when Mr. Derreck came to see him on October 18, 2006, he was not aware of the events described in the emails above. He said that, if he had received the email in which Councillor McTaggart expressed her fear that the roof might cave in, it would have been investigated, "If it was a complaint."<sup>91</sup>

Mr. Derreck told Mr. Clouthier that he should go over to the Library and do an inspection.<sup>92</sup> Mr. Derreck testified that he was concerned about the potential liability of the City, given that saturated tiles were falling down. He said that he was concerned that, with leaks of salt-laden water coming from the parking lot above the Mall, and with leaks in various places throughout the Mall over 27 years, there might be a structural concern. There was also potential for problems related to water getting into electrical fixtures. As Mr. Derreck put it in an email to Councillor McTaggart later that day:

[I]t concerned me that no inspection had been done to this point – which could leave the City hanging out to dry – or at least embarrassed – if anyone were to be hurt or made ill, or a business forced to shut down or suffer any loss because of the leakage dilemma. Health and safety in general is another issue that begged action and a report by our inspector.<sup>93</sup>

Mr. Derreck testified that Mr. Clouthier initially appeared reluctant to conduct the inspection himself, suggesting that Mr. Allard should deal with it on his return to the office the next day. Mr. Derreck told him that he had to conduct an initial inspection that day.<sup>94</sup>

Mr. Clouthier then went over to the Mall. He saw that the Library roof was leaking in many places. Ceiling tiles were missing, buckets had been placed to catch the water, tarps had been put over the books, and the carpet was wet. It was clear to him that it had been leaking badly for quite a while. He did not take a ladder, so was unable to go above the ceiling tiles. He did use a flashlight to look above the ceiling where the tiles had fallen and was surprised at the severity of the leaking. He testified, "[I]t was dripping from everywhere." He did not look at any other locations in the Mall. He took no notes or photographs. A video filmed in the Library on October 18, 2006,

was shown during his evidence, depicting the situation he described. He testified that, when he visited the Mall, the situation was similar to what was shown in the video, but not quite as bad. He returned to city hall and told Mr. Derreck what he had found. They agreed that he and Mr. Allard would conduct a second inspection the following day.<sup>95</sup>

### Consultation with Library and health and safety staff

Mr. Derreck met with Ms. Morin, Ms. Croxson, Mr. Gagnon, Ms. Leddy, and Ms. Williams on October 18 as well. Following the meeting, Mr. Derreck prepared a “Draft Action Plan,” which set out what the group had proposed. He circulated it to the attendees at the meeting and to Mayor Farkouh, before implementing all the recommendations. It stated, in part:

#### Proposed Actions

...

1. ...

Sue will also provide a summary of the notices given to and conversations had with the building manager about the leakage, damage and other effects and requests made for remedial action (dates & times, written and verbal) and responses received.

2. Andrea Leddy and Tanya Williams will contact the Provincial Ministries of Labour and Health and report issues of work stoppage and dangers to health and safety (from water leakage, mold, etc., and expressed fears of a potential roof cave-in at adjacent units). Inspections will also be requested ...

3. Chris Cloutier, Building Inspector has been directed to perform an inspection of the affected mall areas this afternoon and to thereafter (priority asap) provide Tom with a summary of his findings and recommendations. *(in order to protect the Library and the City from being found in neglect of their responsibilities and/or being assigned culpability in the event that disease or injury should arise from water damage or structural failure. [Emphasis in the original.]*

...

5. Tom will then contact the City Solicitor (M. Virginia MacLean), fill her in, and get her advice about Tom proceeding to contact the mall owner directly, by telephone and subsequent email and written communication – to hopefully elicit a quick and effective resolution of the problem on the owner’s part as well as demonstrating and recording due diligence and a proactive response to the matter on the City’s part ... particularly because the issue impacts other commercial areas of the building and poses a potential health and safety threat to members of the general public as they visit and shop.

...

6. The Mayor and members of Council will be informed – via written summary – of actions taken, so as to ensure that they’re all in the picture before the weekend.

...

7. At Council’s regular meeting on Monday, October 23rd, Tom will provide a general overview of the matter to date – with the attendance and support of Katherine Croxson – together with a recommendation that an In-Camera session be initiated to discuss legal and property issues arising out of the situation.

8. *Council will give direction – particularly if the City’s building inspection report recommends closure of the whole or some part of any affected commercial areas and/or if we receive legal advice suggesting actions that the City or Library might consider as a response to getting no or unsatisfactory remedial action and compensation on the mall owner’s part. [Emphasis added.]*

...

I spoke briefly about this with Mayor Farkouh just after our meeting and have copied this to him with a request for his views and advice.<sup>96</sup>



## Consultation with Mayor Farkouh: two different versions

Mr. Derreck spoke with Mayor Farkouh after he met with Mr. Clouthier. He told the mayor that he (Mr. Derreck) had been informed that the City had never responded to the leakage situation and suggested that this report was surely not true. He said that Mr. Farkouh's reaction was one of surprise that he was "coming on" the way he was; the mayor was skeptical because Mr. Derreck was new in town, and he (the mayor) questioned if all of this action was really necessary. Mr. Derreck testified:

There was some remark, it might not have been that day, it might have been a day or so later, but perhaps understandably too, that I don't go running off doing something that is going to negatively impact businesses or unnecessarily impact the mall in an inappropriate way. And I think there was a bit of coolness too because if I'm correct the underlying message is that some people had been seriously asleep at the switch. It was a combination of things. But he did not discourage me.<sup>97</sup>

"And I think there was a bit of coolness too because if I'm correct the underlying message is that some people had been seriously asleep at the switch."

– Tom Derreck

Mr. Derreck made an entry to his Business Action Record which follows a similar vein. He wrote on October 19:

Draft action plan approved by all. Discussed briefly with Mayor, who approved of what has been done to date and noted the economic sensitivity needing care in how we proceed (*ie: We don't want to bring about a closure of any part of the mall and thereby put it in jeopardy while at the same time showing due diligence of action on the City's part from the standpoints of health, safety and addressing the costs emanating from leakage – now topping \$12,000.*)<sup>98</sup> [Emphasis in the original.]

Mr. Derreck, when asked about this entry, testified:

Well, the Mayor was concerned about this ... going very fast. And he was concerned that I don't do anything or bring anything on that is going to interfere with the ongoing operations of the Mall.

Q. And what was your reaction to that?

A. Well my reaction was, and this was a ... friendly conversation ... I emphasized to the Mayor that these other issues ... are in play. So I'm aware that I'm not going to do anything that's ... not intended to ... be going about with cleats on my shoes and causing negative conditions to appear suddenly. So no ... closing the Mall was not in my mind.<sup>99</sup>

Mr. Farkouh's evidence was different. He recalled speaking to Mr. Derreck about the Draft Action Plan and agreed that he had approved of what had been done to that point. He denied discussing the economic sensitivity of the situation at all. He agreed, however, that the situation was economically sensitive and that such sensitivity was even more acute in Elliot Lake than a mall closing would be in another community – because of its importance to the Retirement Living program and to the entire city.<sup>100</sup>

Mr. Farkouh's evidence varied significantly from Mr. Derreck's note in his Business Action Record as well as his testimony on a potential closure of the Mall. Initially, Mr. Farkouh testified:

And in my recollection, I also pointed out to him that we should follow all the appropriate legal steps to ensure that all the due diligence is being done, and if that should lead to the ultimate closure, partial or otherwise, then we're on sound foundation.<sup>101</sup>

After further questioning, however, he not only denied saying "we don't want to bring about a closure of any part of the mall and thereby put it in jeopardy" – as Mr. Derreck had written in his Business Action Record – but denied discussing the subject of closure in any way.<sup>102</sup>

I conclude, for the reasons set out below, that Mayor Farkouh had given Mr. Derreck a warning against putting the Mall in jeopardy, as set out in italics in his Business Action Record.

## Second inspection

On October 19, Mr. Allard returned to Elliot Lake. Mr. Clouthier told him of the events of the previous day, and they then conducted a joint inspection of the Mall. Mr. Allard sent his report to Mr. Derreck. It read in part:

- This appears to be the first time in the past 4 years an ongoing leakage problem with the Mall roof has been brought to the attention of Building Department staff for either structural concerns or property standards compliance matters.
- Three tenant areas of the building were briefly reviewed; Library, Northern Reflections, Zellers. These are locations where roof leakage is evident. Dollarama apparently has leakage problems, as well, but we did not review this area. Northern reflections was closed due to the leakage and some of the stock was removed to other areas of the mall. ... The Zellers Store has ceiling tiles removed and tubs placed on the floor where leakage was occurring. In the one area of the store that we looked into the ceiling space (personal hygiene products dept.) a steel beam was found to be missing a portion of it's [sic] fire protection material where leakage and rust occurred. In Zellers there appeared to be quite a number of isolated leakage points through-out the store.
- The Library tenant space appeared to be the most extensively damaged of the locations reviewed. At the time of the inspection there did not appear to be a lot of water entering the building in the fiction book area, however, a small amount of dripping was occurring from soaked insulation. Tiles were removed along a beam and drain pipe run; tarp covered book shelves; large containers to collect water were on the floor and fans & dehumidifiers were running to dry out the area. This general area of the Library was cordoned off to prevent entry by the public. The exposed ceiling area in view was examined with a flashlight from the floor only. Insulation with a foil-type backing was in place against the roof deck. The main roof beam in this area had approximately a ten foot length of the fire protection material missing from the bottom flange and had a crust of rust over the entire exposed area. Little else could be seen, given the vantage point and remaining material covering the structure.
- In any of the areas observed, there was nothing seen or mentioned that would lead us to believing the structure is in imminent danger of collapse or for that matter that it is any where close to this condition. *However, the information that we were given, and the fact that there is substantial rust in the leak areas is testimony that this is a long standing and ongoing leakage problem. The concern that this raises is that the continuous entry of water onto the steel structure may have had or may still have an adverse impact on the structural elements and it's [sic] connections. To dispel any of these suspicions, a structural review of the leak areas by a Professional Engineer will be necessary.*
- Concerns with respect to the loss of fire protection material from portions of the steel structure has been passed on to the Fire Chief this afternoon and a follow-up inspection has been conducted by Fire Department personnel.

While on site last Thursday, we reviewed the remediation that was being conducted on the Roof/ (Parking Deck) and Mr. English [sic] explained the process in considerable detail. He appeared to be extremely knowledgeable in applying Dow-Corning silicon sealants and claims extensive experience with very similar projects and problems as that at hand. The repairs involve removing the existing urethane sealant at all of the joints and cracks in the concrete slab surface (several hundred thousand linear feet) routing and etching the joint, placing of a closed cell foam backing rod into the crack and applying a specific Dow-Coring silicon product to seal the joint ... When requested, Mr. England was unable to provide a written specification or plan for the overall roof leakage remediation. The level of comfort for both the owner and affected tenants that an unwritten remediation program and schedule can not be all that high and should be formalized.

At this point, in accordance with the Levels of Service Policy, we will be involved in Property Standards enforcement based on a complaint of a tenant (the Public Library). The focus of our involvement will be in regards to answering concerns on the structure as a result of the leakage and that the leakage itself be resolved. We will be issuing a notice of violation to the owner tomorrow in this regard.<sup>103</sup> [Emphasis added.]

Mr. Allard explained in his evidence that his reference to not having seen anything that would lead him to believe that the structure was “in imminent danger of collapse” was inserted in the report as a reaction to Councillor McTaggart’s concern, as expressed in her email, about the roof caving in with cars parked on it. He testified that he concluded there was no such imminent danger because “it didn’t look like there was steel hanging loose or, you know, ready to topple over.” He did not look at any of the connections of the steel beams; he stood on the floor and shone a flashlight from 10 feet away onto a beam.<sup>104</sup>

Mr. Allard testified that, as indicated in the portion of the report in italics, he had concerns about the condition of the structural steel and wanted an engineer to give the City advice on whether it was structurally sound. He never got such a report.<sup>105</sup> Nor did his successors until October 2009, three years later. And that report failed to provide the assurances that the City had sought, as I will later explain.

### Legal advice for the City

Mr. Derreck also sought legal advice from Virginia MacLean, a lawyer who had been advising the City of Elliot Lake for many years. He testified that he was concerned that, if the Mall was closed as a result of his actions, he wanted to be certain that “any influence I bring into play is on firm ground.” He was concerned that the Library’s lease with the Algo Centre made it difficult for the Library to have any remedies against the Mall’s owner for damages resulting from the leaks. He was also concerned about the City’s potential responsibility for damages to the Library’s patrons, given that the City funded the Library and was required to approve its lease.<sup>106</sup>

### City Council approval of Mr. Derreck’s recommendations

#### Mr. Derreck recommends taking action and advises council that he has not done anything that might result in the Mall’s closure

Mr. Derreck prepared a report to City Council about the issues arising as a result of the water damage to the Algo Mall and the Library before its meeting of Monday, October 23. That report summarized Ms. MacLean’s legal advice:

Members are aware that a severe leakage of roof water has disrupted Library services, damaged and/or destroyed some of the Library’s collection and physical resources, and adversely affected the operations of other commercial tenants.

Inspections of the Library and other tenant and public areas have been completed by the City’s Property Standards and Building officials, Fire Department and Health and Safety officer.

Exposed structural beams display rust and erosion of fire-retardant materials. Wet insulation, plugged and corroded run-off drains and leaky pipes between the roof and interior ceilings are also factors causing concern.

The matter has been discussed with the City’s insurance adjuster and with legal counsel, who has also reviewed the lease agreement.

*All appropriate steps have been taken to meet the City’s legislative responsibilities in terms of safeguarding public health and safety, short of actually submitting reports to the Ministries of Health and Labour or doing anything else that might result in the mall’s partial or total closure.*

Legal counsel has verbally recommended that;

1. The mall owner be formally provided with written notice of the inspections conducted, their findings, and the remedies to be undertaken and be advised that the cost of all consequential damage, loss and/or injury emanating from *internal as well as external structural failures* will rest with him,
2. The payment of rent be stopped as of the initial date of the leakage and placed in an accumulating trust account pending the final outcome of the matter,



3. Any remedy intended to be applied by the owner be first approved by the City's Building, Fire and Health and Safety officials and be carried out according to a program of inspections and staged approvals established by them,
4. The said notice be sent by registered mail and the owner be given seven (7) days to respond, from the date of his receiving the notice, and,
5. The City identify and provide any mortgagor with a copy of the said notification.<sup>107</sup> [Emphasis added.]

Mr. Derreck concluded his report by recommending to council that he be authorized to forthwith implement Items 1, 2, 3, and 4 of the recommendations provided by Ms. MacLean.<sup>108</sup>

### **Mayor Farkouh warns Mr. Derreck against closing the Mall, and this advice affects Mr. Derreck's recommendations**

Mr. Derreck was asked why he had pointed out in the report that "all appropriate steps had been taken to meet the City's legislative responsibilities in terms of safeguarding public health and safety, short of actually submitting reports to the Ministries of Health and Labour or doing anything else that might result in the Mall's partial or total closure." He said he included this sentence because the mayor had already expressed his concern to him about closing the Mall, and he (Mr. Derreck) was going to stop short of anything that would lead to that result; he had no authority to bring about a closure. He testified that he showed this report to Mayor Farkouh before he sent it to council. He described the mayor's reaction as "stoic." He said the mayor did not seem surprised about the possibility of the inspection resulting in an order to fix the leaks.<sup>109</sup>

Mr. Derreck was also asked why he had not recommended to council that Ms. Williams and Ms. Leddy contact the provincial ministries of Health and Labour and report dangers to health and safety caused by leaks, as he had said he would in his Draft Action Plan. He said that he had consulted with others, concluded that the situation was in hand, and so removed that recommendation. Instead, he assured council that the provincial government had not been notified. He denied that anyone had directed him to make that change, saying that he had made the decision after talking to other people.<sup>110</sup>

Mr. Farkouh was directed to this reference in Mr. Derreck's report to council and asked if he had had, at any time, discussions with Mr. Derreck about doing something that might result in the Mall's partial or total closure. He answered, "Not that I recall." He denied having such discussions with anyone else.<sup>111</sup>

There is a clear difference in the evidence between Mr. Derreck and Mr. Farkouh on this point. Mr. Derreck testified that Mr. Farkouh told him at least once that he was concerned that Mr. Derreck not do anything that might bring about the total or partial closure of the Mall. He made a note in his "Business Action Record" which said so specifically. He then made it clear in his report to council that he had not reported anything to the provincial government which might have that effect. That evidence is all consistent with his having been warned by the mayor in his first week of employment to avoid taking any such steps.

Mr. Derreck's testimony is also consistent with the evidence of Fred Bauthus that, in both his first and second tenure as the chief administrative officer, there was a view, on the part of City staff and council, that the Mall was important to the community and the Library was important to the Mall. As Mr. Bauthus explained, the Mall was a major economic centre for the city and an important meeting place for the people. It was a significant part of promoting the city as a retirement community and, without it, the Retirement Living Program would suffer. According to his testimony, that view was shared by Mayor Farkouh and the council before he left in 2000, and by Mayor Hamilton and council throughout his second tenure between September 2007 and June 2010. City hall staff had an "understanding that it was important."<sup>112</sup>

Mr. Allard testified to this “understanding”:

And you know, you can, I guess, surmise ... what the political feelings of the community would be, certainly. The mall was a very important structure and I can see that there would be concern, that if it was gone, there would be big issues with the City.<sup>113</sup>

This “understanding” is also reflected in the email that Councillor McTaggart sent to Mr. Derreck on October 19, 2006, in which she suggested that the Building Department would not have inspected the Mall without a request from Mr. Speck. She wrote:

The building department was definitely aware of the problem. Why they have not been involved until now, I have no idea. In all fairness to Syl Allard, for whom I have the utmost respect, would Troy Speck have had to request them to do an inspection? If that is the case, then that is your answer.<sup>114</sup>

Mr. Farkouh denied saying that steps should not be taken which could lead to the Mall’s closure, but his testimony on this point was contradictory, as explained above. Furthermore, given Mr. Farkouh’s own acknowledgment of the importance of the Mall to the community, it is difficult to believe that he did not even mention the potential for closure of the Mall when it was front and centre in documents on which he was asked to comment.

I conclude that Mr. Farkouh did speak to Mr. Derreck, as the note in his Business Action Record (a contemporaneous record) indicates, and told him that the City should not take any steps to bring about closure of any part of the Mall. He did so knowing that the ongoing leaks could potentially cause structural damage to the Mall. He was aware of the long history of the leaks and probably knew that such leaks were potentially harmful to steel. Furthermore, the Draft Action Plan itself said, in italics, that there was a potential for structural failure. I also conclude that, as a result of receiving this advice from Mayor Farkouh, Mr. Derreck did not direct that the Ministry of Labour and the Ministry of Health be notified and took pains to assure council in his October 23 report that he had stopped short of taking any steps that might result in the Mall’s total or partial closure.

### **Council members know of the potential for structural damage to the Mall, yet they avoid any measures that might cause closure**

Members of council knew that Mayor Farkouh had stopped short of taking any steps that could result in the Mall’s total or partial closure. They also knew that the leaking water could potentially cause structural damage that could lead to injuries. Mr. Derreck had explicitly referred to the risk of such damage in his report.

Not all councillors testified before me, but Mr. Hamilton did give evidence. He was a councillor in October 2006 and was at the meeting of October 23. He answered questions from Commission counsel as follows:

Q. So he was telling you that the lawyer said, and he agreed, that there [were] potential structural failures which could cause injury, right?

A. That is what he was telling us, yes.

Q. And that is just common sense if there is rust on the structural beams, right?

A. No, I don’t think I could give you a competent answer whether a rust on a structural beam would cause a failure. I’m not a structural engineer, sir.

Q. Well, did you know that the beams held the building up?

A. I knew some beams held the building up, yeah.

Members of council knew that Mayor Farkouh had stopped short of taking any steps that could result in the Mall’s total or partial closure. They also knew that the leaking water could potentially cause structural damage that could lead to injuries.

Q. Well, would you know that a beam that is called a structural beam held the building up?

A. Yes.

Q. And did you know that when metal rusts, it loses its strength?

A. It depends on the extent of the rust, sir, I would think. But again, I'm not a structural engineer, so I don't think this discussion is going to take us very far.

...

Q. So you knew, as you said, that rust on metal could cause it to lose its strength depending on how far it went, right?

A. Well, that makes sense, yeah.

Q. So can't we agree that you and all Council knew as of the time you got this report that there was rust on the beams that might cause structural problems?

A. According to this report, yes.

Q. And you had no information to the contrary, right?

A. No.<sup>115</sup>

Council went into private session (appropriately since they were discussing legal advice) and, on resuming the public session, passed a resolution authorizing Mr. Derreck to "forthwith implement remedies as detailed in the report."<sup>116</sup>

Mr. Hamilton testified that there was no discussion of Mr. Derreck's recommendation to refrain from notifying the ministries of Labour and Health or of his assertion that he had taken no steps to bring about partial or total closure of the Mall.<sup>117</sup> In approving Mr. Derreck's remedies, however, council was tacitly endorsing this approach.

Mr. Allard was present at the meeting and knew that council had made this decision while in receipt of the advice, which may well have originated in his report, that there was potential structural damage at the Mall.<sup>118</sup> This, together with his knowledge of the "political feelings of the community," probably influenced his actions (or inaction) regarding the Mall before he left the City's employ.

## October 24, 2006: Notice of Violation and Order to Conform to the Fire Code

Earlier on October 23, Mr. Allard had telephoned Chief Paul Officer to advise him that, during his inspection at the Library and at Zellers, he had noticed that the fireproofing material protecting the structural steel had fallen off, leaving sections of the beam exposed. Mr. Allard advised Chief Officer that he felt this decay was a *Fire Code* issue. Chief Officer asked Ken Barnes, an officer with the Elliot Lake Fire Department, to conduct an inspection. Mr. Barnes confirmed Mr. Allard's observations.<sup>119</sup>

The next day, October 24, 2006, Mr. Allard issued a Notice of Violation to Eastwood Mall Inc. The notice stated:

An inspection on October 19, 2006 has revealed that a provision or requirement of the following By-Law(s) have been contravened. Legal action may be instituted unless this violation is rectified. You are hereby directed to correct the following violation(s) forthwith.

VIOLATION: section 5.1(a) [of By-law 03-29, the Property Standards By-law] The Roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings ... The roof drainage system, where present, shall be kept in good repair, watertight, and free of health and accident hazards. Leakage was observed at various points within the Algo Centre Mall including numerous locations in Zellers, Northern Reflections, and the City of Elliot Lake Public Library.



REMEDY: Carry out repairs of the existing mall roof/parking surface to prevent leakage of water into the building including repairs to the roof drainage system. Within 14 days of receipt of this notice, provide a written description of a repair program that will be undertaken to achieve a watertight roof and include a schedule outlining the time frames necessary to have the work completed.

VIOLATION: Structural Capacity – Every part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected. Materials that have been damaged or show evidence of dry rot or deterioration shall be repaired or replaced in a workmanlike manner. Water leakage over a long period of time at various locations in the mall has caused extensive rust on structural members and their location in some areas.

REMEDY: A review by a Professional Engineer of building structural frame in leakage areas must be conducted forthwith and a report certifying the acceptability of the existing condition or the remediation steps necessary to be taken to ensure structural capacity must be provided to the Chief Building Official by December 15, 2006.

Your property will be inspected within 3 days of receiving this notice to ensure compliance with the By-Law. If you wish to discuss this matter with the By-Law Officer, please phone 461-7230 during office hours. [Emphasis in the original.]<sup>120</sup>

On October 30, 2006, in accordance with the resolution of council, Mr. Derreck wrote to Bob Nazarian, advising him that City Council had directed that

- inspections that had been conducted disclosed “conditions that violate various provisions of Provincial Acts and regulations and of City by-laws regarding the structural integrity of the mall building, and the health and safety of tenants and members of the public who visit and shop at the mall”;
- the cost of all damages would rest with Eastwood;
- the City would stop paying rent for the Library space pending a satisfactory outcome; and
- any remedy must first be approved by the City’s building, property standards, fire, and health and safety officials and be carried out by a program of inspections and scheduled approvals staged by them.<sup>121</sup>

The letter specified that Eastwood had seven days to respond. It was copied to a number of City officials, including Mayor Farkouh, Ms. Croxson, Chief Officer, and Mr. Allard.<sup>122</sup>

On November 1, 2006, Chief Officer sent a letter to Bob Nazarian, advising him that the fire inspection had disclosed contraventions of the *Fire Code* and requested that he repair or replace the fireproofing material that had been removed or dislodged from the structural steel in accordance with the requirements of the Ontario *Building Code*. He also advised him that a building permit was required.<sup>123</sup>

## **Conclusion: Mr. Derreck’s actions initiate the City’s first official action to try to fix the roof**

With these steps, the City of Elliot Lake had taken the first official action, in its capacity as regulator of property standards, against the Mall. This building had been leaking, to the knowledge of the entire town, for the previous 27 years. Although conditions at the Library at this time were severe, similar conditions had existed before. Only 15 months earlier, Mr. Kennealy had told the chief librarian, Mayor Farkouh, and Mr. Speck that the experts had advised that a solution to the Mall’s “structural issues” would cost \$1.5 million, and that NorDev was not prepared to spend the money. That disclosure did not result in any action on the part of the City. I have no hesitation in concluding that, if Mr. Derreck had not been hired as the chief administrative officer in October 2006, these actions would not have been taken. Mr. Derreck had successfully caused City Council to take action. As a result, it could not be said by any member of the council that they were unaware of the situation.

At least one councillor exploited the situation and used it as the basis of his campaign in the election three weeks later, November 13, 2006. On October 24, 2006, Councillor Ken Rastin sent an email to a citizen who had left a note on his website complaining about the state of the Library. Carolyn Davie wrote:

My concern, and the concern of many people, is the deplorable condition of our public library. A quick visit would show you the situation. Approximately half of the library is closed due to water damage – *people are afraid that one of these days a car will come through the roof.*<sup>124</sup> [Emphasis added.]

Councillor Rastin's lengthy reply concluded:

I fully agree with you with regards to the deplorable state that it is in and has been in on numerous occasions over the years ... The library is in the top 5 issues that have been mentioned to me either through phone calls, email or during my in person visits at doors

...

Last night council began addressing the library issues and more specifically the leakage issues in the mall. The item went in camera and I intend to continue following up on it to find what details I can about current plans, and how, if elected, I can help effect these plans.<sup>125</sup>

Councillor Rastin was re-elected. Unfortunately, the new council did not take any further steps to "effect these plans" until September 2009, almost three years later, despite numerous reminders about the state of the Library. In fact, it does not appear that council even inquired about the status of its only attempt at enforcement of its Property Standards By-law at the Mall.

## Eastwood's initial response to the Notice of Violation: talk but no action

### October 2006: Bob Nazarian, knowing about the potential for structural damage from the leaking roof, decides to sell the Mall

Bob Nazarian admitted that he knew about the severe water damage at the Library over the weekend of October 14 and 15, 2006.<sup>126</sup> He also admitted that at that time he "was certain that the roof was not repairable"<sup>127</sup> and "felt the roof was never going to work."<sup>128</sup> He testified that, when he received the letter of October 30 which enclosed the Notice of Violation, he realized he had to deal with the roof. He decided then and there to sell the Mall at any price. He was asked for his reaction when he got the letter and testified:

A. I knew that I have to stop people parking on the roof. That roof is not made for the parking, and I don't know how did they come to the conclusion to make a parking on top of the roof with all kind of default regarding the core slabs, not being proper and topping which cracked all over the place, and dumped everything on me to repair and remedy and suddenly a City that is wake up with orders after orders, if you don't do it, we will do this, if not, if this, if that, there was not much I could do.

The only thing was that either I had to put a dome on top of it so that the water would not come in or I had to stop the cars from parking on top of the roof or I had to make additional parking.

This was the true advice that I could have got from myself. As an experienced person that I have worked so many years and I have solved so many problems, for the first time I am on the corner, that I cannot do it and I cannot back up.

So, that is the time when I asked my son to start marketing and get rid of this under any price or any situation.

Q. And was that when you made the decision to sell the mall?

A. Yes.<sup>129</sup>

Bob Nazarian also admitted that, at this time, he knew that there was a potential for damage to the structural members and their connections caused by the salt-laden water. He attempted to resile from this admission but then reiterated it. He gave the following evidence:

Q. And when you read it [the notice of October 24] you realized Mr. Allard was concerned about the effect of water, which caused rust both on structural members and their connections. Did that surprise you?

A. No. Not at all.

Q. And were you aware at the time that there was a potential risk of damage to the structural members, that is the steel beams and the core slabs and their connections?

A. Under no circumstances, sir, I had any doubt that the structure of the building is sound and nothing to worry about. The only thing I was worried about is why I cannot repair this damned building.

Q. Mr. Allard – you'll agree with me that Mr. Allard was concerned, that there might be structural damage as a result of the leaks and the rust to the beams and their connections, right?

A. Yes.

Q. That's what he's telling you in this?

A. Yes, yes.

Q. And you knew that when you read it?

A. That's right. But at the same time, sir, I'm sorry I interrupt you but at the same time, this leak was continuing for over 30 years and nobody issued any violation order.

Q. And you knew it had been continuing.

A. Yes.

Q. At this time, in October –

A. At this time I knew.

Q. You knew that it had been continuing since the building was built?

A. Yes.

Q. And you knew that Mr. Allard had the concern that it might cause – might have caused structural damage to the beams and the connections?

A. Yes, Mr. Allard was doing his job.

Q. And did you agree with that there might be –

A. Possible.

Q. You agreed it was possible?

A. Possible, yeah.

Q. Possible that there was structural –

A. I didn't have doubt but – there is possibility.

Q. Possibility that, just to be clear, that there was damage to the structural steel and connections; right?

A. Right. Possible.<sup>130</sup>



## October 2006: Mr. Derreck speaks to Mall management

Mr. Derreck decided to speak to the responsible persons at the Mall personally before sending the Notice of Violation so that he could explain why this step had been taken. He met with Mr. Turner, the Mall manager, on October 24 or 25. Mr. Derreck testified that Mr. Turner was frustrated because, as he told him, he had been working hard to address the problem for some time. Mr. Derreck tried to explain to Mr. Turner that this action was necessary for the City's purposes, and now that he had the notice, the City would work with him.<sup>131</sup> I presume Mr. Turner's reference to his hard work was the attempt to apply the silicone product suggested by Mr. England, which was abandoned that fall and not revived in the spring.

Bob Nazarian came to Elliot Lake about a week later and met with Mr. Derreck. Mr. Allard was not at the meeting. Mr. Derreck testified that Mr. Nazarian was upset because, in his view, he had been doing his best to deal with a problem that he had inherited. He complained that he had not been given full disclosure about the state of the leaks before he bought the building. Mr. Derreck impressed upon Mr. Nazarian the importance of getting the leaks fixed.<sup>132</sup>

## October 2006: Tom Turner recommends retaining an engineer

Bruce Caughill, who had done work in the Mall while it was owned by both Algocen and NorDev, heard there was a new Mall manager. He went to see him in the hope of getting some architectural work and found Mr. Turner supervising the workers who were applying sealant to the deck in an attempt to fix the leaks. Mr. Turner asked if he had any drawings for the Mall, and Mr. Caughill advised that he did.<sup>133</sup>

The following day, October 25, Mr. Caughill emailed Mr. Turner, telling him that the drawings showed a 3-inch concrete topping on 8-inch precast concrete slabs. The slabs were 4 feet wide, so some of the cracks on the surface might be over the panel joints below. He advised that the parking deck drawings showed a total superimposed design load of 120 pounds per square foot (psf), so that, with the 3-inch topping of about 36 psf, about 84 psf would be left for cars and/or snow. He also told him that the *Building Code* required that garages be designed for 50 psf for passenger cars and 125 psf for unloaded light trucks. Finally, he advised Mr. Turner that snow can be quite dense and that they had measured it in other places at up to 10 to 12 psf.<sup>134</sup>

Mr. Caughill noted in the email that the topping was not shown on the structural drawings, so it was not considered an integral part of the structure.<sup>135</sup> He did not tell him that the 1999 Halsall Associates engineering report on the roof said the opposite – that the topping *was* required to provide adequate structural capacity.<sup>136</sup> This issue, which had caused problems during the time Algocen owned the Mall, would also be important during Eastwood's repair efforts, such as they were.

Mr. Caughill testified that he also provided Mr. Turner with a copy of both the November 1998 and May 1999 Halsall reports: the first had spoken of the potential for structural damage;<sup>137</sup> and the second had proposed two methods to stop the leaks.<sup>138</sup> He did not, however, provide him with a copy of the email he received from Randy Beltramin of STEM Engineering dated September 8, 2003.<sup>139</sup> It noted that the Halsall report did not address the "continue as is' scenario, which NorDev is doing" (and which Eastwood had continued), instead of doing the extensive work that his firm had recommended, and stated that "this can have long-term detrimental results as the structure slowly deteriorates."<sup>140</sup> Bob Nazarian denied ever seeing the Halsall reports, although Mr. Turner testified that he sent them to him.<sup>141</sup>

Mr. Turner forwarded Mr. Caughill's email to Bob Nazarian the next day, recommending that he retain Mr. Caughill to review the structure of the Mall as required by the Notice of Violation.<sup>142</sup> Bob Nazarian recalled reading the email from Mr. Turner, but not Mr. Caughill's email, which was part of and immediately below Mr. Turner's email forwarding it to him.<sup>143</sup>

## November 2006: Eastwood makes promises that are not fulfilled

On November 13, 2006 (one day before the deadline set out in Mr. Derreck's letter of October 30), Mr. Turner wrote to Mr. Derreck, providing Eastwood's "action plan regarding leaks in the roof of the mall." The letter enclosed a copy of the "project timetable" covering the repairs to be completed before the forthcoming snow conditions would stop the work. The timetable set out dates when certain portions of the roof would be repaired by ripping out the old caulking, then grinding, re-sealing, and caulking with the silicone product. More than half the target dates were in October; the latest date was November 14. Mr. Turner advised in the letter that they were already nine days behind schedule as a result of poor weather. He wrote:

As you are aware, this roof has leaked for the last 25 years and during that time a multitude of methods were used to patch joints and plug holes. Contrary to previous practices, our company has decided to repair the roof completely ...

Our plan is

1. to replace the aged urethane products in over 15,000 linear feet of joint with Dow-Corning 890SL silicone;
2. to replace five major expansion joint systems;
3. to remove at least ten drains and install new ones;
4. to cut out and epoxy some 12,500 linear feet of crack-line; and;
5. to repair damaged cement areas with a polymer-cement products; specifically Sika-Dur 35 and Armatek.<sup>144</sup>

Mr. Turner continued: "We expect to have an engineer's report available to us in the near future and I will forward it on to you once it is received."<sup>145</sup> He testified that he made this promise because he had received Bob Nazarian's assurance that he would take care of it and get an engineer's report.<sup>146</sup> Mr. Turner noted: "[O]ne leak area continues to elude us in the library and we suspect it may be caused by the major expansion joint at the north ramp. Our crew started working on it today."<sup>147</sup> Mr. Derreck sent a copy of the letter to all members of council, Ms. Morin, Chief Officer, Mr. Allard, and Ms. Leddy, with a notation beside the last three names "for follow up as appropriate."<sup>148</sup>

The promises made by Mr. Turner on behalf of Eastwood were not fulfilled. In his testimony, Mr. Turner said that Bob Nazarian responded to his suggestion that Bruce Caughill be retained by telling him that he (Mr. Nazarian) would take care of that.<sup>149</sup> He took no steps to do so, however, until months later. As explained below, he told Mr. Turner in January 2007 that he had agreed to retain Mr. Caughill.<sup>150</sup>

Bob Nazarian gave a number of evasive answers when asked why it took him so long to retain an engineer. Initially, he testified that it was not surprising that it would take three or four months to hire an engineer.<sup>151</sup> When asked why it was reasonable to wait that long when the Notice of Violation had required an engineer's report by December 15, less than two months later, he answered, "No comment."<sup>152</sup> When asked whether there was anything else he could say to explain the delay in hiring the engineer, he testified: "Guilty as charged. What can I say?"<sup>153</sup>

Bob Nazarian admitted that the promises made by Mr. Turner were not fulfilled. He testified that

- he was “not sure” whether they finished replacing the aged urethane products in over 15,000 linear feet of joint with Dow Corning silicone, but the result was “not good”;<sup>154</sup>
- none of the expansion joints was replaced until the summer of 2008;<sup>155</sup>
- the work to replace the 10 drains and install new ones was “probably” done;<sup>156</sup> and
- some of the cracks were cut out and treated with epoxy in 2006 and some in 2007.<sup>157</sup>

As I have indicated above, in the spring of 2007 Bob Nazarian told Mr. Turner that the new product was too expensive and to return to using the product used by Retirement Living.<sup>158</sup>

## November–December 2006: The City does nothing to enforce the order

Mr. Hamilton became mayor on December 1, 2006. He testified that he never asked what remedies Mr. Allard had required Eastwood to undertake or what remedies had been implemented. He took no steps, until September 2009, to deal with these issues or to see that they were fixed.<sup>159</sup>

**Mr. Hamilton became mayor on December 1, 2006. He testified that he never asked what remedies Mr. Allard had required Eastwood to undertake or what remedies had been implemented. He took no steps, until September 2009, to deal with these issues or to see that they were fixed.**

Mr. Derreck testified that, after he received the November 13, 2006, letter from Mr. Turner, he spoke to Mr. Allard on a few occasions and asked him “how things were going.” He received no specific information from him. Mr. Turner told Mr. Derreck that he had provided a copy of the Halsall report to Mr. Allard, and, although Mr. Derreck spoke to Mr. Allard about his having received the report from Mr. Turner, he did not read it himself. Mr. Allard did not tell Mr. Derreck anything about its contents. Mr. Derreck did not ask Mr. Allard whether an engineer’s report had been received by December 15, as required by the order. As he testified, “[I]t was his [Mr. Allard’s] order.” He did not speak to Mr. Allard after December 2006 about the notice.<sup>160</sup>

Mr. Allard recalled receiving the November 13, 2006, letter from Mr. Turner. When asked whether he followed up on the letter, he said, “I think we basically monitored the situation.” When asked what that included, he testified that he “kept an eye on the documentation that was coming in” (which consisted of an

email from Mr. Turner in January 2007 and one from Mr. Caughill in February) and, while he was visiting the Mall for other purposes, he noticed that they had equipment on the roof and were making some progress. He did not go to the Mall to see if there were still leaks. He did not ask the Library if there were still leaks, although he testified “there was absolutely not a word from the Library.” Until he left the position of chief building officer and property standards officer on May 30, 2008, Mr. Allard did not ask for any plans in addition to what was contained in the letter of November 13, 2006. He never received an engineering report.<sup>161</sup>

Mr. Clouthier was not provided with the letter of November 13, 2006. He was not aware, as the letter stated, that the leaks had been ongoing for 25 years. He did not know what steps Mr. Allard had taken to follow up on the notice. He was not asked to conduct any further inspections. He testified that, as far as he knew, Mr. Allard was handling matters following the inspection of October 2006. He also testified that, in his opinion, a building permit would have been required for the work outlined in the November 13 letter.<sup>162</sup>



Had Mr. Allard checked, or had he been kept advised of the situation by City staff, he would have learned that the Library continued to suffer from leaks. On December 14, 2006, Ms. Morin sent an email to Mr. Derreck, Ms. Leddy, Ms. Williams, Mr. Gagnon, Councillor McTaggart, and the members of the Library board. She wrote:

I wanted to keep you all up-to-date with the situation of the leaks in the library.

Nov. 6: leaks in the French collection area, bucket req'd. Three wet tiles in Fiction area, no buckets req'd.

Nov. 7: leaks in French collection area, bucket req'd. Two wet tiles in Fiction area; no buckets req'd.

Nov. 8: leaks in French collection area, bucket req'd. Leaks in Fiction area over M-N authors, buckets placed on floor, area cordoned off.

Nov. 9: leaks in most problem areas; Fiction, French, wall between circulation desk and large print collection, office behind circ. Desk. Buckets were placed in French and fiction areas and fiction area cordoned off.

Nov. 13: leaked over the weekend, water gathered on tarps in fiction area. Carpets had just been cleaned on Nov. 10th.

Nov. 14: leaks in Fiction area, 2 buckets on floor, tarp covering small area, cordoned off.

Nov. 29: leaks between circulation desk and large print area. Bucket placed on floor.

Dec. 11: 3 wet tiles in fiction area but did not leak through. No buckets req'd.

Dec. 12: 3 wet tiles in fiction area, 1 wet tile between circ. Desk and large print area. Stained tiles had just been changed on Friday, Dec. 8th.

Dec. 13: leaks in fiction, French, wall between circ. Desk and L.P. area, and office behind circ. Desk. Maintenance removed "pregnant" wet tile between circ. Desk and L.P. area.

Dec. 14: 3 wet tiles in fiction area, no buckets req'd. Small tarp covering section.

To say the least, I am not looking forward to Spring '07.

Keeping you informed.<sup>163</sup>

Both Mr. Allard and Mr. Clouthier denied any knowledge of the continuing leaks at the Library and testified that they had not been sent a copy of this email. Mr. Allard commented that he found it "curious" they were not copied with these types of communications.<sup>164</sup> I find it more than curious that he did nothing to determine whether the leaks were being dealt with.

Mr. Allard testified that he did nothing on December 14, 2006, about the fact that Eastwood had failed to comply with the requirement in the Notice of Violation to deliver an engineering report by that day. He testified that he "essentially accepted the statement made in the middle of November by Mr. Turner that they were retaining an engineer."<sup>165</sup>

## 2007: Eastwood's promises to the City continue unfulfilled

### January–February 2007: Eastwood gives the appearance of retaining Bruce Caughill to provide the engineering services required by the Notice of Violation

On January 9, 2007, after Bob Nazarian had authorized him to do so, Mr. Turner contacted Mr. Caughill and sent him:

- the Notice of Violation;
- Chief Officer's letter of November 1, 2006, outlining the *Fire Code* issues that needed to be dealt with; and
- Mr. Turner's letter to Mr. Derreck of November 13, 2006, and related correspondence and documents.<sup>166</sup>

Mr. Caughill testified that, when he read the Notice of Violation, he realized that it was a "huge undertaking, and it was not anything that I would do. I would hire people to do [it]." He explained that the structural aspects of the work required were beyond his capability, and he would not have the resources to do it on his own.<sup>167</sup> The same day, Mr. Caughill wrote to Michael Kesin, a structural engineer, advising him that he had received the Notice of Violation, noting that "to answer the CBO's concerns there's quite an inspection regimen required. It's a small Mall but there are quite a few ceilings involved."<sup>168</sup>

Mr. Caughill met Mr. Turner on February 20, 2007. Mr. Turner testified that, during that meeting, he and Mr. Caughill discussed what Eastwood was doing to address the leaks. They discussed the concept of putting a roof over the parking deck or paving it. He said that Mr. Caughill had concerns about the weight of the pavement on the roof. Mr. Caughill was not, however, being retained to fix the leaks. He was being retained to provide an opinion on the structural integrity of the building.<sup>169</sup>

Two days later, on February 22, 2007, Mr. Caughill sent an email to Mr. Allard, writing:

**To keep you informed.**

Algo Centre Mall (Eastwood Mall Inc.) has retained us to provide assistance in this matter.

On February 20, 2007 I met with Mr. Turner on site to review the Notice of Violation. I provided Mr. Turner with a copy of a report that we had in our files: Structural Condition Assessment, prepared in May 1999 by Halsall Associates Limited.\*

I believe this report addressed the water penetration and possible deterioration of structure that is the subject of the current Notice of Violation – but in 1999.

I have suggested that Mr. Turner provide a copy of this report for your records.

We will be working with Algo Centre Mall as they continue to repair the water leakage paths and any damaged members/components they come across.

An overall assessment will be conducted and a report submitted within six months. Copies of inspection reports will be submitted as they occur.

Should any changes in our relationship with Algo Centre Mall (Eastwood Mall Inc.) change in the interim, we will advise you immediately.<sup>170</sup>

• • • • •

\* Note that earlier in his testimony, as explained above, Mr. Caughill testified that he had provided both the 1998 and the 1999 Halsall reports to Mr. Turner after his initial meeting with him at the Mall on October 24, 2006, the day of the Notice of Violation (Bruce Caughill testimony, May 10, 2013, pp. 9207–12). Mr. Allard testified that he received them in or about February 2007 (Allard testimony, April 29, 2013, p. 7045). Whenever the reports were sent, it is clear that they were received by Mr. Turner and the City (Turner testimony, June 4, 2013, pp. 12727–8).

## **Mr. Caughill does no work, contrary to his and Eastwood's promises to the City**

As matters turned out, none of the expectations set out in this email came to fruition. Mr. Caughill did not do any work “with Algo Centre as they continue to repair the water leakage paths and any damaged members/ components they come across.”<sup>171</sup> He did no work in relation to the Notice of Violation and never discussed any such work with Mr. Nazarian. He testified that he received nothing in writing from Eastwood about retaining him other than the copy of the email from Mr. Turner to Mr. Allard of January 15, 2007.<sup>172</sup> He never presented a proposal to Eastwood or Mr. Turner for the work that he was going to do, and he did not get any scope of work instructions from Mr. Turner. Mr. Turner never raised the issue again.<sup>173</sup>

Mr. Caughill testified that he did not do the work he had told the City he was going to do because he was not able to work out a retainer with Eastwood.<sup>174</sup> Mr. Turner testified that Mr. Caughill had told him that he and Bob Nazarian had had a dispute about getting paid – that Mr. Caughill had said he did not work for nothing.<sup>175</sup> Mr. Caughill testified that he had a dispute with Mr. Nazarian about payment for other work he had done for Eastwood in June and July 2007. It was his evidence that he was ultimately paid for that work by Eastwood, although Bob Nazarian initially refused to pay, saying that he had not approved the expenditure. Mr. Caughill testified that he was terminated in July 2007 and was paid in November 2007 after he wrote Mr. Nazarian a letter on September 4, 2007, outlining the work he had done for him and demanding payment.<sup>176</sup>

Bob Nazarian's evidence was different. He testified that he was dissatisfied with Mr. Caughill's services on the other work he had done. He did agree, however, that he had not paid Mr. Caughill's invoices and that he terminated his services. Although Mr. Caughill testified that his termination occurred in July 2007, Mr. Nazarian's evidence was that it happened in November 2007.<sup>177</sup>

I prefer Mr. Caughill's evidence about the termination of his services relating to the Notice of Violation.

## **Bob Nazarian never intended to hire an engineer to deal with the Notice of Violation**

Other than telling Mr. Turner to retain Mr. Caughill, Mr. Nazarian had done nothing since October 2006 to comply with the Notice of Violation and produce an engineering report about the structural capacity of the building. He knew as of September 4, 2007, that Mr. Caughill was not going to do the work for him. In his letter of that date to Bob Nazarian, Mr. Caughill advised that he would notify the City of Elliot Lake of Eastwood's termination of his services on the fire safety and structural issues raised by the Elliot Lake Fire and Building Departments.<sup>178</sup> (He did not do so until September 2008.)

Bob Nazarian was asked why he did nothing to hire another engineer after Mr. Caughill's services were terminated, given his own knowledge of the potential structural problems caused by the water on the steel. He responded:

The water penetration was nothing new. And I wonder, suddenly, how come the City back up and start ordering one after another do it now and do it now or else.<sup>179</sup>

I conclude that Bob Nazarian never intended to spend the money required to obtain an engineering report following the Notice of Violation. The best evidence of his intentions consists entirely of his inaction. Nor did his treatment of the leaks change through the spring, summer, and fall of 2007. He continued to deal with them the same way that they had always been treated.



## **The City does nothing to ensure compliance with the Notice of Violation**

### **Mr. Turner advises Mr. Allard that he will be meeting with Bruce Caughill during the week of January 22, 2007, but Mr. Caughill does not provide a report**

On January 15, 2007, Mr. Turner emailed Mr. Allard, advising him that he would be meeting with Caughill and Associates at the Mall the following week to begin an onsite inspection of the roof to identify any fire-retarding materials needing replacement. Mr. Allard wrote on a copy of the email: "Follow-up regarding the structural report from P. Eng. Listed in the Order to Comply – do further follow-up on Thurs. Jan. 25/07."<sup>180</sup> As noted above, the meeting between Mr. Turner and Mr. Caughill took place on February 20, not the week following this email. It appears that Mr. Allard did not follow up on January 25, as he had noted he would. Had he done so, he would have learned that Eastwood was moving more slowly than promised.

Mr. Caughill had no communications with anyone at the City of Elliot Lake about his work with respect to the Notice of Violation after sending the email to Mr. Allard on February 22, 2007, until, as is seen in a later section of this Report, he advised Bruce Ewald, Mr. Allard's replacement as chief building official, and Chief Officer in September 2008 that he would not be submitting a report.<sup>181</sup> Mr. Caughill testified that neither Mr. Allard nor Chief Officer ever followed up with him after February 2007, although Chief Officer's evidence was that he was "almost positive" that he had called Mr. Caughill in September 2008, the week before that letter was sent.<sup>182</sup>

### **The Halsall reports are provided to the City and ignored**

The Halsall reports, which were provided to Mr. Allard, did not revive the City's interest in compelling Eastwood to obtain an engineering report about the structural capacity of the Mall or to repair the leaks. Mr. Allard acknowledged that he received them and that he realized they articulated concerns about the Mall: that water was leaking onto the structural members, that water was penetrating the roof, and that the roof was far from watertight.<sup>183</sup> Nevertheless, Mr. Allard did nothing to enforce compliance after receiving the reports.<sup>184</sup>

### **Senior City staff know of the ongoing leaks**

City officials were well aware of the continued leaks at the Mall. Indeed, it was common knowledge in the City. Mr. Turner testified that when he saw staff from city hall – Mr. Allard, Mr. Derreck, and Mr. Clouthier – in the Mall during lunch hour, he would speak with them. The topic was often the leaks. He testified:

You know, it was a standing piece of conversation around Elliot Lake when there was heavy rains going on. You know, instead of saying, hi, how are you? It would be more like, hi, how are the leaks. So very common.<sup>185</sup>

## Mr. Derreck's replacement, Mr. Bauthus, is not told about the Notice of Violation; despite learning of continuing problems, he does nothing

Mr. Derreck's employment with the City of Elliot Lake was terminated on July 24, 2007, a bare nine months after he was hired.<sup>186</sup> On September 4, 2007, Mr. Bauthus commenced his second term as the chief administrative officer.<sup>187</sup> Mr. Bauthus testified that, on his return, he met with various City managers to bring himself up to date on what was happening and what the current issues were. He met with Ms. Sprague (the City clerk, to whom Mr. Allard reported), Mr. Allard, and Fire Chief Officer. He was not told about the Notice of Violation. I have difficulty understanding that he would not have been given that information within two weeks of his taking on the job. Mr. Derreck had learned of the history of the leaks, caused inspections to be made, and had it discussed and dealt with at council.<sup>188</sup>

Mr. Bauthus learned, however, very shortly after his return that the Library wanted to move out of the Mall because the people who worked there were completely fed up with the situation with the leaks.<sup>189</sup> In October 2007, Ms. Morin prepared a report for the purpose of obtaining a new facility for the Library. It contained, among other things, a summary of a survey of Library users which had been conducted earlier that year. When asked what they liked least about the Library, the most frequent response – more than twice as frequent as the next – was “leaky roof / water damage.”<sup>190</sup>

On October 18, 2007, Ms. Williams, the City's representative on the Joint Health and Safety Committee, prepared a report entitled “Library Leaks.” It noted that on October 13, 2007, the employees who came in on Saturday noticed leaks starting in the Library, so they set up the “drip zone”; when they turned on the lights, sparks were noticed in the ceiling lights; the lights were turned off and remained off; Ms. Williams and the employee representative on the committee decided on October 18 to leave the lights off. The report also noted that large amounts of water were still dripping from the roof, missing the tarps intended to protect the books, and that Councillors Doug Souliere and Reinhardt “came in to view the leaky situation to get a better idea of what the Library was dealing with and how important it is to get the Library out of the Mall.”<sup>191</sup> Mr. Bauthus testified that he saw this document and knew that Ms. Williams thought it was important for the Library to move out of the Mall for health and safety reasons.<sup>192</sup>

As was indicated by a document produced by the City, Mr. Bauthus also testified that, as of October 26, 2007, the City had reserves set aside of \$208,938 for future Library rent, and \$485,674 for the Library building. In his testimony, Mr. Bauthus said that these reserves meant that the City had set aside this amount of cash, from prior years' excess of revenues over expenditures, to be spent on Library accommodation. These were real, not nominal, accounts – the money was in the bank.<sup>193</sup> Given the available funds, the concerns expressed by the Library and Ms. Williams, and the fact that the lease at the Mall was coming to an end, Mr. Bauthus testified that he had engaged in a discussion with Mayor Hamilton about whether the City should be looking for alternative accommodation for the Library. He said that, although he could not recall what was said at that specific discussion, Mayor Hamilton was not generally in favour of the Library moving out of the Mall. As I explained above, he testified that the mayor felt the Mall was important to the community, and the Library was important to the Mall.<sup>194</sup>

## The mayor and the council know of the continuing leaks and do nothing to inquire about the response to the Notice of Violation

On November 5, 2007, the City's Economics and Finance Committee received a report from the Library board about the need for a new or renovated Library facility. The minutes of the meeting note that water leakage

It was also clear that there were ongoing health and safety concerns resulting from the leaks. Yet no steps were taken to enforce the Notice of Violation issued a year earlier after a full discussion in council. Remarkably, council did not even ask for a status report from the Building Department.

has been a problem in the Mall and that the Library board had passed a motion the previous week rejecting relocation within the Mall. The mayor, Councillors Reinhardt, Morissette, Patrie, and Freitag, and Mr. Bauthus were all in attendance. I conclude, as Mayor Hamilton admitted in testimony, that it was clear to them that the leaks were continuing and that the Library, being extremely dissatisfied with its situation, again wanted to move out of the Mall – just as it had two years earlier.<sup>195</sup> It was also clear that there were ongoing health and safety concerns resulting from the leaks. Yet no steps were taken to enforce the Notice of Violation issued a year earlier after a full discussion in council. Remarkably, council did not even ask for a status report from the Building Department.

## Mr. Allard knows of the potential risks and does nothing

Mr. Allard was questioned closely about his conclusion that there was no imminent danger or a structurally compromised situation in the Mall when he conducted his inspection on October 19, 2006. He testified that, if he were of the opinion that it was unsafe, he would have issued an emergency order under the *Building Code Act*. He agreed, however, that the only basis for his conclusion was one instance of looking at a beam from a distance of 10 feet with a flashlight. Mr. Allard confirmed that he did not have the qualifications to come to any significant conclusions about structural integrity – both in his evidence before me and in requiring a report from an engineer on that crucial issue.<sup>196</sup> His failure to follow up on Eastwood's failure to comply with the Notice of Violation and obtain an evaluation from a qualified professional of the risk faced by persons inside the Mall is both inexplicable and mystifying. It causes me great concern.



## Notes

- <sup>1</sup> Bob Nazarian testimony, July 23, 2013, pp. 17492–3.
- <sup>2</sup> Bob Nazarian testimony, July 23, 2013, p. 17616.
- <sup>3</sup> Bob Nazarian testimony, July 23, 2013, p. 17616.
- <sup>4</sup> Bob Nazarian testimony, July 23, 2013, p. 17483.
- <sup>5</sup> Kennealy testimony, April 18, 2013, p. 5649.
- <sup>6</sup> Snow testimony, April 3, 2013, pp. 3948–9.
- <sup>7</sup> Bob Nazarian testimony, July 23, 2013, pp. 17616–19.
- <sup>8</sup> McCulloch testimony, June 13, 2013, pp. 14346, 14382–3.
- <sup>9</sup> Fazekas testimony, March 12, 2013, p. 1271.
- <sup>10</sup> Exhibit 11-111.
- <sup>11</sup> Bob Nazarian testimony, July 23, 2013, pp. 17625–8.
- <sup>12</sup> Exhibit 13-11.
- <sup>13</sup> Bob Nazarian testimony, July 23, 2013, pp. 17628–30.
- <sup>14</sup> Turner testimony, June 4, 2013, pp. 12682–5.
- <sup>15</sup> Turner testimony, June 4, 2013, pp. 12685–91.
- <sup>16</sup> Turner testimony, June 4, 2013, pp. 12692–3.
- <sup>17</sup> Exhibit 4127.
- <sup>18</sup> England testimony, May 8, 2013, p. 8439.
- <sup>19</sup> Turner testimony, June 4, 2013, pp. 12693–6.
- <sup>20</sup> Exhibit 235.
- <sup>21</sup> Bob Nazarian testimony, July 23, 2013, p. 17634.
- <sup>22</sup> Bob Nazarian testimony, July 23, 2013, p. 17634.
- <sup>23</sup> Exhibit 4128.
- <sup>24</sup> Bob Nazarian testimony, July 23, 2013, pp. 17639–40.
- <sup>25</sup> Turner testimony, June 4, 2013, p. 12762.
- <sup>26</sup> Turner testimony, June 4, 2013, pp. 12757–80.
- <sup>27</sup> Exhibit 235, p. 002.
- <sup>28</sup> Bob Nazarian testimony, July 23, 2013, pp. 17653–4.
- <sup>29</sup> Turner testimony, June 4, 2013, p. 12703.
- <sup>30</sup> Exhibit 10-89.
- <sup>31</sup> Turner testimony, June 4, 2013, p. 12790.
- <sup>32</sup> Bob Nazarian testimony, July 23, 2013, pp. 17657–8.
- <sup>33</sup> Turner testimony, June 4, 2013, pp. 12696–8.
- <sup>34</sup> Exhibit 985, p. 01.
- <sup>35</sup> Exhibit 3339, pp. 205–14.
- <sup>36</sup> Exhibit 3339, p. 203.
- <sup>37</sup> Exhibit 3339, p. 208.
- <sup>38</sup> Speck testimony, April 24, 2013, pp. 6680–1; Farkouh testimony, May 2, 2013, p. 7960.
- <sup>39</sup> Exhibit 3349.
- <sup>40</sup> Allard testimony, April 29, 2013, pp. 7014–20, 7029–32.
- <sup>41</sup> Exhibit 2026.
- <sup>42</sup> Speck testimony, April 25, 2013, p. 6855.
- <sup>43</sup> Exhibit 11-6.
- <sup>44</sup> Speck testimony, April 25, 2013, pp. 6855–6.
- <sup>45</sup> Speck testimony, April 25, pp. 6856–7.
- <sup>46</sup> Exhibit 1699, pp. 01–02.
- <sup>47</sup> Exhibit 1699, p. 01.
- <sup>48</sup> Exhibit 1699, pp. 00–01.
- <sup>49</sup> Exhibit 11-113.
- <sup>50</sup> Exhibit 11-113.
- <sup>51</sup> Farkouh testimony, May 7, 2013, pp. 8303–4.
- <sup>52</sup> Farkouh testimony, May 7, 2013, pp. 8308–9.
- <sup>53</sup> Hamilton testimony, July 9, 2013, pp. 15035–46.
- <sup>54</sup> Speck testimony, April 25, 2013, pp. 6870–5.
- <sup>55</sup> Speck testimony, April 25, pp. 6957–9.
- <sup>56</sup> Sprague testimony, July 12, 2013, p. 16031.
- <sup>57</sup> Sprague testimony, July 12, 2013, pp. 16029–30.
- <sup>58</sup> Sprague testimony, July 12, 2013, pp. 16030–2.
- <sup>59</sup> Speck testimony, April 24, 2013, pp. 6644–5.
- <sup>60</sup> Allard testimony, April 29, 2013, p. 7001.
- <sup>61</sup> Sprague testimony, July 12, 2013, pp. 15973–7.
- <sup>62</sup> Allard testimony, April 29, 2013, pp. 7022–31.
- <sup>63</sup> Allard testimony, April 29, 2013, pp. 7074–8; Exhibit 11-113.
- <sup>64</sup> Clouthier testimony, April 23, 2013, pp. 6346–7, 6356–8.
- <sup>65</sup> Exhibit 1698.
- <sup>66</sup> Exhibit 1698.
- <sup>67</sup> Farkouh testimony, May 7, 2013, pp. 8311–13.
- <sup>68</sup> Allard testimony, April 29, 2013, p. 7082.
- <sup>69</sup> Allard testimony, April 29, 2013, pp. 7081–8.
- <sup>70</sup> Clouthier testimony, April 23, 2013, pp. 6362–3.
- <sup>71</sup> Derreck testimony, May 13, 2013, pp. 9335–9.
- <sup>72</sup> Derreck testimony, May 13, 2013, p. 9346.
- <sup>73</sup> Derreck testimony, May 13, 2013, pp. 9342–3.
- <sup>74</sup> Exhibit 11-116.
- <sup>75</sup> Derreck testimony, May 13, 2013, pp. 9360–1.
- <sup>76</sup> Derreck testimony, May 13, 2013, pp. 9362–4.
- <sup>77</sup> Derreck testimony, May 13, 2013, pp. 9363–4.
- <sup>78</sup> Derreck testimony, May 13, 2013, p. 9365.
- <sup>79</sup> Exhibit 11-119.
- <sup>80</sup> Exhibit 3356.
- <sup>81</sup> Exhibit 11-20.
- <sup>82</sup> Farkouh testimony, May 7, 2013, pp. 8317–23; Exhibit 3357.
- <sup>83</sup> Derreck testimony, May 13, 2013, p. 9373.
- <sup>84</sup> Exhibit 11-121.
- <sup>85</sup> Exhibit 3355.
- <sup>86</sup> Mr. Derreck testified that this meeting took place on October 16; other evidence establishes that it took place on Wednesday, October 18: Exhibit 3374, p. 003; Clouthier testimony, April 23, 2013, p. 6373.
- <sup>87</sup> Derreck testimony, May 13, 2013, p. 9381.
- <sup>88</sup> Officer testimony, April 23, 2013, p. 6234.
- <sup>89</sup> Officer testimony, April 23, 2013, pp. 6258–9.
- <sup>90</sup> Allard testimony, April 29, 2013, p. 7082.
- <sup>91</sup> Clouthier testimony, April 23, 2013, p. 6375.
- <sup>92</sup> Derreck testimony, May 13, 2013, p. 9382; Clouthier testimony, April 23, 2013, p. 6378.
- <sup>93</sup> Derreck testimony, May 13, 2013, pp. 9382–6; Exhibit 11-124.
- <sup>94</sup> Derreck testimony, May 13, 2013, p. 9383.
- <sup>95</sup> Clouthier testimony, April 23, 2013, pp. 6378–86; Exhibit 11-47.
- <sup>96</sup> Exhibit 1706.
- <sup>97</sup> Derreck testimony, May 13, 2013, pp. 9386–7.
- <sup>98</sup> Exhibit 3374.
- <sup>99</sup> Derreck testimony, May 13, 2013, p. 9400.
- <sup>100</sup> Farkouh testimony, May 7, 2013, pp. 8329–31.
- <sup>101</sup> Farkouh testimony, May 7, 2013, p. 8329.
- <sup>102</sup> Farkouh testimony, May 7, 2013, p. 8332.
- <sup>103</sup> Exhibit 177.
- <sup>104</sup> Allard testimony, April 29, 2013, pp. 7132–4, 7186–7.
- <sup>105</sup> Allard testimony, April 29, 2013, pp. 7134–6.
- <sup>106</sup> Derrick testimony, May 13, 2013, pp. 9401–4.
- <sup>107</sup> Exhibit 11-129.
- <sup>108</sup> Exhibit 11-129.
- <sup>109</sup> Derreck testimony, May 13, 2013, pp. 9417–20.
- <sup>110</sup> Derreck testimony, May 13, 2013, pp. 9512–16.
- <sup>111</sup> Farkouh testimony, May 7, 2013, pp. 8334–5.
- <sup>112</sup> Bauthus testimony, May 16, 2013, pp. 10190–1.

- <sup>113</sup> Allard testimony, April 29, 2013, p. 7186.
- <sup>114</sup> Exhibit 11-19.
- <sup>115</sup> Hamilton testimony, July 9, 2013, pp. 15055-7.
- <sup>116</sup> Exhibit 167.
- <sup>117</sup> Hamilton testimony, July 9, 2013, pp. 15057-9.
- <sup>118</sup> Allard testimony, April 29, 2013, pp. 7142-3; Exhibit 167.
- <sup>119</sup> Exhibit 3367.
- <sup>120</sup> Exhibit 175.
- <sup>121</sup> Exhibit 11-23, pp. 002-003.
- <sup>122</sup> Exhibit 11-23, pp. 002-003.
- <sup>123</sup> Exhibit 11-23.
- <sup>124</sup> Exhibit 11-133.
- <sup>125</sup> Exhibit 11-133.
- <sup>126</sup> Bob Nazarian testimony, July 23, 2013, p. 17660.
- <sup>127</sup> Bob Nazarian testimony, July 23, 2013, p. 17664.
- <sup>128</sup> Bob Nazarian testimony, July 23, 2013, p. 17676.
- <sup>129</sup> Bob Nazarian testimony, July 23, 2013, pp. 17700-1.
- <sup>130</sup> Bob Nazarian testimony, July 23, 2013, pp. 17680-2; see also p. 17692.
- <sup>131</sup> Derreck testimony, May 13, 2013, pp. 9424-5.
- <sup>132</sup> Derreck testimony, May 13, 2013, pp. 9433-5.
- <sup>133</sup> Bruce Caughill testimony, May 10, 2013, pp. 9205-7.
- <sup>134</sup> Exhibit 90.
- <sup>135</sup> Exhibit 90.
- <sup>136</sup> Exhibit 70, p. 007.
- <sup>137</sup> Exhibit 66, pp. 0035-6.
- <sup>138</sup> Exhibit 70, p. 006.
- <sup>139</sup> Exhibit 85.
- <sup>140</sup> Exhibit 85; Bruce Caughill testimony, May 10, 2013, pp. 9178-9, 9211.
- <sup>141</sup> Bob Nazarian testimony, July 23, 2013, pp. 17609-10; Turner testimony, June 4, 2013, p. 12736.
- <sup>142</sup> Exhibit 5371.
- <sup>143</sup> Bob Nazarian testimony, July 23, 2013, pp. 17695-8.
- <sup>144</sup> Exhibit 11-23, pp. 006-9.
- <sup>145</sup> Exhibit 11-23, p. 007.
- <sup>146</sup> Turner testimony, June 4, 2013, p. 12725.
- <sup>147</sup> Exhibit 11-23, p. 007.
- <sup>148</sup> Exhibit 11-23, p. 006.
- <sup>149</sup> Turner testimony, June 4, 2013, pp. 12717-18.
- <sup>150</sup> Turner testimony, June 4, 2013, pp. 12722, 12725; Exhibit 990.
- <sup>151</sup> Bob Nazarian testimony, July 23, 2013, pp. 17701-2.
- <sup>152</sup> Bob Nazarian testimony, July 23, 2013, p. 17704.
- <sup>153</sup> Bob Nazarian testimony, July 23, 2013, p. 17705.
- <sup>154</sup> Bob Nazarian testimony, July 23, 2013, p. 17688.
- <sup>155</sup> Bob Nazarian testimony, July 23, 2013, pp. 17688-90.
- <sup>156</sup> Bob Nazarian testimony, July 23, 2013, p. 17690.
- <sup>157</sup> Bob Nazarian testimony, July 23, 2013, pp. 17690-1.
- <sup>158</sup> Turner testimony, June 4, 2013, pp. 12696-8.
- <sup>159</sup> Hamilton testimony, July 9, 2013, pp. 15067-8.
- <sup>160</sup> Derreck testimony, May 13, 2013, pp. 9443-6.
- <sup>161</sup> Allard testimony, April 29, 2013, pp. 7149-61.
- <sup>162</sup> Clouthier testimony, April 23, 2013, pp. 6426-8.
- <sup>163</sup> Exhibit 11-139.
- <sup>164</sup> Allard testimony, April 29, 2013, pp. 7161-3; Clouthier testimony, April 23, 2013, pp. 6428-9.
- <sup>165</sup> Allard testimony, April 29, 2013, pp. 7166-7.
- <sup>166</sup> Turner testimony, June 4, 2013, p. 12722; Exhibit 990.
- <sup>167</sup> Bruce Caughill testimony, May 10, 2013, p. 9217.
- <sup>168</sup> Exhibit 989.
- <sup>169</sup> Turner testimony, June 4, 2013, pp. 12729-31.
- <sup>170</sup> Exhibit 11-23, p. 0013.
- <sup>171</sup> Exhibit 11-23, p. 0013.
- <sup>172</sup> Bruce Caughill testimony, May 10, 2013, p. 9220; Turner testimony, June 4, 2013, pp. 12731-3.
- <sup>173</sup> Bruce Caughill testimony, May 10, 2013, p. 9227.
- <sup>174</sup> Bruce Caughill testimony, May 10, 2013, p. 9225.
- <sup>175</sup> Turner testimony, June 4, 2013, p. 12732.
- <sup>176</sup> Bruce Caughill testimony, May 10, 2013, pp. 9228-9.
- <sup>177</sup> Bob Nazarian testimony, July 23, 2013, pp. 17706-8.
- <sup>178</sup> Exhibit 822.
- <sup>179</sup> Bob Nazarian testimony, July 23, 2013, p. 17710.
- <sup>180</sup> Exhibit 2348.
- <sup>181</sup> Exhibits 350 and 3436.
- <sup>182</sup> Bruce Caughill testimony, May 10, 2013, p. 9227; Officer testimony, April 22, 2013, pp. 6128-9.
- <sup>183</sup> Allard testimony, April 29, 2013, pp. 7045-6.
- <sup>184</sup> Allard testimony, April 29, 2013, pp. 7198-214.
- <sup>185</sup> Turner testimony, June 4, 2013, p. 12727.
- <sup>186</sup> Derreck testimony, May 13, 2013, p. 9503.
- <sup>187</sup> Bauthus testimony, May 16, 2013, p. 10142.
- <sup>188</sup> Bauthus testimony, May 16, 2013, pp. 10172-4.
- <sup>189</sup> Bauthus testimony, May 16, 2013, pp. 10181-2.
- <sup>190</sup> Exhibit 11-2, p. 6048.
- <sup>191</sup> Exhibit 11-148.
- <sup>192</sup> Bauthus testimony, May 16, 2013, p. 10184.
- <sup>193</sup> Bauthus testimony, May 16, 2013, pp. 10185-7.
- <sup>194</sup> Bauthus testimony, May 16, 2013, pp. 10188-90.
- <sup>195</sup> Exhibit 3401; Hamilton testimony, July 9, 2013, p. 15071.
- <sup>196</sup> Allard testimony, April 29, 2013, pp. 7186-8.

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Between December 2007 and the fall of 2008, Eastwood owner Bob Nazarian repeatedly promised the City and his tenants that the leaking roof of the Mall would be fixed, and he appeared to take steps to do so. Unfortunately, that appearance was not a reality. Although he hired – or announced he had hired – a number of consultants and contractors, he resiled from contracts to which he had agreed, fired the people he had hired, or failed to move forward after receiving partial advice.

The summer of 2008 can only be described as a debacle. As a result of Mr. Nazarian's parsimonious ways and failure to take advice, work on the roof was begun and then abandoned after causing significantly increased flooding. Mr. Nazarian patched the damage by himself, with the help of Eastwood's maintenance staff. He sought new funding and placated his own mortgagee's demands by producing false documents showing that work was being done on the roof when it was not. He recognized that the Mall's structural steel potentially had been damaged by the leaks, that he needed a permanent solution, and that the roof was not reparable. Instead of putting a solution in place, he made a half-hearted proposal that the City give him land so that he could move the cars off the roof.

Throughout it all, the City did nothing. It did not enforce the Notice of Violation its chief building officer had issued in October 2006. It knew that the leaks raised potential structural issues and effectively ignored them. It allowed the problem to continue.

## **December 2007 to April 2008: Eastwood promises that the roof will be fixed – and the City believes it**

### **Bob Nazarian retains architect John Clinckett for advice about the leaks**

In December 2007, John Clinckett, an architect from Kitchener, Ontario, was hired by Eastwood to advise on how to deal with the roof leaks. Brian England, who was advising Eastwood on sealants, testified that Mr. Clinckett had instructed him when he qualified for the certified technical representative designation in 1998 and that Bob Nazarian had used his services in the past in the Kitchener area.<sup>1</sup>

Mr. Clinckett testified that, when he was first contacted, he went to the Mall and met with Tom Turner, the Mall manager, Mr. England, and Henrieth Laroue. (The latter worked for Eastwood Mall from September 2007 until May 2011 and was referred to as the assistant Mall manager when Mr. England replaced Mr. Turner as Mall manager in February 2008.<sup>2</sup>) Mr. Clinckett recalled walking the roof and looking at some of the Mall inside. He was told that there was considerable leaking into the tenant spaces below the roof. He noticed stained ceiling tiles and rusted "T-bar" that supported the tiles.<sup>3</sup>

On December 18, 2007, Bob Nazarian signed a purchase order with Mr. Clinckett. It read:

DECK ENCLOSURES AND CANOPIES.

PLEASE CONDUCT FEASABILITY STUDY / RESEARCH FOR TOP PARKING DECK.

...

Preliminary Investigation: not to exceed \$2,000.00

Structural Design not to exceed \$1,000.<sup>4</sup>

Bob Nazarian testified that he retained Mr. Clinckett to advise him on what to do to eliminate the leaks and fix the roof.<sup>5</sup>



An agenda for a meeting in January 2008 between Mr. Clinckett and Bob Nazarian listed 10 items to be discussed, including “Core Slab – roof – investigate.”<sup>6</sup> Bob Nazarian testified that he wanted Mr. Clinckett to do a number of things, including determining whether it was possible to put additional weight on the roof.<sup>7</sup>

Mr. Clinckett testified that in 2008 he was given a copy of the 1999 Halsall Associates engineering report on the Mall roof. He read it and noted that its authors had found leaks going through the joints between the hollow core slabs on the roof deck and onto the structural steel supporting the slabs. Nevertheless, he never examined the supporting structural steel under the precast slabs. He testified that would have been an engineer’s function, and, despite the language in the purchase order by which he was retained, he never had an engineer assist him to determine what load the roof could support.<sup>8</sup> As explained below, he later changed his evidence on this point – he did work with an engineer.

Bob Nazarian asked Mr. Clinckett to consider the feasibility of putting a roof over the top of the structure to deal with the leaks. Both Mr. Clinckett and Mr. Nazarian testified to this point, and Mr. Clinckett said it was Bob Nazarian’s idea.<sup>9</sup> Mr. Clinckett testified that such a roof would not be a complete solution to the problem because cars would still be driving onto the parking deck after having picked up snow, ice, and salt, which would then drip and leak through the deck.<sup>10</sup>

## **Tenants are given false promises that a solution to the leaks is imminent**

On January 7, 2008, Mr. Turner received a call from three senior executives of Hudson’s Bay Company, the owner of Zellers, the largest tenant in the Mall. They were complaining about the leaks – water was running through their storeroom and into their electrical room, right by the electrical panel. Mr. Turner determined that that leak was caused by improper maintenance on a drainpipe which was Zellers’ responsibility. He so advised the Hudson’s Bay executives. He went on to say that Eastwood was awaiting a report from Mr. Clinckett about the feasibility of putting a roof structure over the parking lot and that they were considering installing a trough under the joint lines above the ceiling in the store in order to collect and dispose of the water that came through the roof deck.<sup>11</sup> As Bob Nazarian admitted, the roof over Zellers had always had problems with leaks.<sup>12</sup>

A note made by an employee of Northern Reflections, another tenant, described a conversation with Mr. England on January 8, 2008. The note indicates that, when the building was constructed, the roof was never waterproofed and that the manufacturer recommended a waterproofing membrane covered by three inches of asphalt. It also indicates that Mr. England told Northern Reflections that, by the end of the week, a contractor would be installing troughs to divert the water to a drain. Eastwood would then replace tiles and clean the carpet damaged by the leaks. The note stated:

- Major Repair April start – written warranty from manufacturer
- full waterproofing membrane
- 3 inches
- starting with Zellers/our store<sup>13</sup>

Bob Nazarian testified that, although by January 8 he had discussed with Mr. Clinckett the possibility of installing a waterproofing membrane covered by three inches of other material, no decision had been made.<sup>14</sup> The promise made by Mr. England to Northern Reflections, recorded in this note, was false.

The same day, January 8, Mr. Turner spoke with Rica Taylor of the Hudson's Bay Company to follow up on the call with the executives of the previous day. At her request, he forwarded a copy of the purchase order with Mr. Clinckett, to confirm that Eastwood had retained a professional to investigate the situation.<sup>15</sup> After that conversation, Ms. Taylor reported to a claims manager at the Hudson's Bay Company that Eastwood had commissioned an architect to do a "structural condition and assessment report," which she expected to receive "as early as next week."<sup>16</sup> No such report was ever received.<sup>17</sup>

Bob Nazarian told Mr. Turner to send a memo to Ms. Taylor and her superior advising of Eastwood's plans for the roof.<sup>18</sup> Bob Nazarian testified that he was taking these concerns from his major tenant seriously.<sup>19</sup> On January 17, 2008, Mr. Turner sent that letter to Ms. Taylor. He wrote:

I refer to our telephone conversation of last week in which we discussed Eastwood's plans regarding the above-noted store and the leak problems from the overhead parking area. As per your request I am writing to confirm we are working diligently on resolving this issue.

As I advised you and Marc Ganier [*sic*], our architect is working concurrently on a plan to cover the overhead parking area. He is investigating all types of structure with the aim of eliminating the leak problem by keeping the elements out of the problem areas. At this time he is in the preliminary reporting stage and I have no results that I can share with you.<sup>20</sup>

Mr. Turner testified that he was told of the plan to cover the parking area in discussions with Bob Nazarian and Mr. Clinckett.<sup>21</sup> In fact, there was no such plan.

## Brian England replaces Tom Turner as Mall manager and nothing changes

On February 4, 2008, Bob Nazarian wrote to Mr. Turner, suspending him as Mall manager and appointing Mr. England as his replacement.<sup>22</sup> Mr. Turner testified that he resigned.<sup>23</sup> Mr. England had no mall management experience before being hired for this job.<sup>24</sup> Within a week or so of his taking on this new role, he and Bob Nazarian met with Hudson's Bay executives in Toronto. Notes taken by a Hudson's Bay Company employee indicate that Eastwood told them that a number of options were being considered, including building a structure or a roof on the parking deck and moving Zellers up one floor and building a new structure. A note stated, "(Bob) Membrane – will be put in as soon as weather permits."<sup>25</sup> Bob Nazarian admitted telling his manager to convey this message to the tenants, although he testified that he did not recall this particular meeting.<sup>26</sup> At this time, no decision had been made to install a membrane. Mr. Clinckett had not yet provided his report. I conclude that Mr. Nazarian gave false information to his tenant in order to placate its concerns.

On February 19, 2008, Gail Bachmann, a Northern Reflections employee, emailed her colleagues to update them on the leaks at the store in the Mall. Echoing what Northern Reflections had been told on January 8, 2008, as set out above, she wrote:

I have been speaking with the new mall manager of Algo Centre over the past week or so regarding the ongoing water leakage problems in our store. He has an engineering background and has just taken over management of the centre in the last couple of weeks and has become much more involved in coming up with a solution to rectify the problem. I have spoken with him again today and he has advised that they now have a temporary and permanent solution to stop the water leaking problem.

For the short term, they have constructed, for the lack of a better description, downspouts to install above our ceiling that will flow the water from the roof to a drain that is located elsewhere in the mall. Unlike the existing tarp and hose that was previously installed, this is a more stable and constructed system that is a safer and a more reliable fix. They have installed these downspouts elsewhere in other areas of the mall with success.

...

The more permanent fix to the roof is slated to begin in April (weather permitting). *The landlord has an agreement in place with the manufacturer/installer of the existing roof for them to perform any required roof repairs, apply a new waterproof membrane and pour an additional insulation layer to the roof. They have a guarantee from the roof manufacturer that this will be a final fix to this long outstanding problem.*

This new mall management is committed to fixing our problem and so for now we have agreed not to pursue a relocation and to give him the opportunity to rectify the problem based on the timing and work he has advised.<sup>27</sup> [Emphasis added.]

Eastwood never had any dealings with HSP, the company that had installed the existing roof. As Bob Nazarian admitted, it was inaccurate for Mr. England to tell Northern Reflections that Eastwood had an “agreement in place” or a “guarantee” from the roof manufacturer.<sup>28</sup> Nor did Eastwood have an “agreement in place” with anyone to apply a new membrane in February 2008; as I will explain below, Mr. Clinckett had not yet sent out a request for proposals for that project. In my view, this letter gave false information to Northern Reflections in order to alleviate its concerns and cause it to stay in the Mall.

## City continues to take no action to force repairs

### Chief Officer reminds Mr. England about the Notice of Violation, but nothing is done

On February 20, 2008, Fire Chief Paul Officer wrote to Mr. England, following a discussion with him. He enclosed a copy of architect Bruce Caughill’s memorandum of February 22, 2007, to Syl Allard, the City’s chief building official and property standards officer, copied to Mr. Officer and Mr. Turner, promising to conduct an assessment and submit a report within six months dealing with the issues in the October 2006 Notice of Violation. Chief Officer wrote: “I am following up to ensure these repairs have taken place as my file does not have any further inspection or verification from Caughill on file. Can you confirm in writing with the final signoff from Caughill Consulting that this issue has been completed?”<sup>29</sup> Mr. England testified that this communication was the first time he had heard of the Notice of Violation. He sent it to Bob Nazarian for him to decide what to do about it.<sup>30</sup>

Chief Officer testified that he received no response from Mr. England.<sup>31</sup> He did not pursue the matter, though it would have been a simple question for him to determine. All he had to do was walk across the parking lot and take a look.

### A complaint of excessive vibration on the roof deck is made to the Property Standards office, but no inspection is carried out

On February 25, 2008, Dale Swan, a property standards and building inspector with the City, emailed Mr. England, advising him:

Our complaints department in City Hall received a concern regarding excessive vibration in the roof-top parking lot. I realize this may be normal and may not be of concern, but I must pass on this information to you. I suppose it may be worse than usual?<sup>32</sup>

Mr. England recalled investigating the situation after receiving this email. He said that a maintenance worker had discovered a truck that was heavier than permitted on the roof and had “shooed” it away. He testified that nobody from the City came over to initiate an inspection as a result of this complaint.<sup>33</sup> Mr. Clouthier testified he was not aware of it.<sup>34</sup>



### **The Library makes legitimate health and safety complaints, yet the City accepts Eastwood's promises and enters into negotiations to renew the Library's lease**

On January 9, 2008, Tanya-Lee Williams, the City staff member responsible for workplace health and safety, prepared a report of a meeting between her, Jim Landry, the employee representative on the City's Joint Health and Safety Committee, and Suzanne Morin, the chief librarian. It noted that

- there were concerns with the continuing leaks into the Library, which had now spread to the children's section;
- on the previous day all the books had been covered with tarps; and
- when lights had been turned on, they made a "zapping, popping sound."<sup>35</sup>

The Library had decided to leave all the lights off in the "leaky half" of its premises until the water stopped dripping and an electrician had been contacted. Nevertheless, the leaking half of the Library would continue to be open to the public because the single light that was left on provided sufficient light; the ceiling tiles did "not look like they will fall down" and "the drip zone has been marked off and as always the patrons are watched to ensure they do not enter that specific area."<sup>36</sup>

Ms. Morin told Mr. Turner about the situation. She also forwarded the report to all members of the Library board, Fred Bauthus (the City's chief administrative officer), Andrea Leddy (the City's personnel director), and all members of City Council.<sup>37</sup>

Mayor Richard Hamilton testified that he read the report and that he knew then that the complaints, which he had known about personally for the previous four years, were getting worse. The corrective measures that had been imposed in October 2006 following the actions of Tom Derreck, the City's chief administrative officer, had not worked. Nevertheless,

- he could recall no discussion about the issue at City Council;
- he took no steps to see that the report was sent to Mr. Allard, although he admitted that it was a complaint under the Property Standards By-law and should have been sent to him; and
- he had no recollection, either specific or general, of having spoken to Mr. Bauthus about issues relating to the leaks between the time Mr. Bauthus returned to the City and January 2008.<sup>38</sup>

Mr. Bauthus also recalled reading the report. He came to the conclusion that the situation was completely unacceptable and had to be dealt with. He knew it was contrary to the Property Standards By-law. Nevertheless, he testified as follows:

Q. Did you consider whether to send an inspector over to look at it and, if necessary, in his discretion, make an order to fix it?

A. No, sir.

Q. Why not?

A. I had anticipated that ... the current issue would be fixed and that Mr. Nazarian was continuing to try to work and try to remediate that problem.

Q. At this stage, sir, it had been 18 years since you started at the City and these leaks had remained the same throughout that period of time, correct?

A. To a varying degree, yes.

- Q. Why did you conclude that it was going to be fixed now if it had not been fixed in the previous 18 years?
- A. I guess because they were continuing to work on that problem.
- Q. But what they were doing didn't work, right?
- A. No, sir, At the end of the day it appears that way, yes.
- Q. Can you give us any explanation for why when Mr. Derreck started on the job, within 10 days after he came across very similar conditions in the library, he had arranged for inspections to be conducted, gone to Council, had orders issued, all within 10 days of him starting? And when you were faced with the same situation, with the knowledge this had been going on for 18 years, you took no such steps?
- A. No, I did not take any specific steps in that regard. There were other steps that we had looked at in terms of looking for alternatives at that time.
- Q. Can you give us any explanation for why he would have moved so quickly and you did nothing with respect to Property Standards?
- A. I can't answer.<sup>39</sup>

On March 10, 2008, Al Collett was appointed a councillor following a sitting councillor's resignation. He testified that, at the time he was appointed, he was well aware that the Library had been complaining about leaks for a number of years. When asked how he knew that, he testified:

Oh boy, to put it lightly, if you weren't aware, you would have to be deaf, dumb, and blind. The citizens were well aware ... But you know, there were jokes being made about the condition of our mall, comments to the tune of if you ever wanted to know the weather outside the mall, just walk inside the mall and you would find out.

Yeah, there were numerous complaints. I think everyone complained.<sup>40</sup>

On March 12, 2008, Ms. Williams prepared a 47-page report, complete with photographs of the Library taken on October 13, 2006, setting out the history of the Library's leak problems and her recommendations. The Library's 20-year lease at the Mall was expiring on September 30, 2009, and a decision would have to be made in the near future about whether the Library would stay in the Mall or move. The report, which was sent to Mr. Bauthus and Ms. Morin, noted:

- leaks had been a problem since the Library moved in in 1989 ("[a]nytime it rains or snows the library roof leaks for two to three days after");
- the long history of complaints, positive tests for mould, recommendations to the City, and lack of action;
- the repeated recommendations by the Joint Health and Safety Committee of the City to have the leaks fixed, to no avail;
- in a detailed recitation, the ongoing attempts, over the previous three years, by Library staff to deal with the leaks by covering the books with tarps, using buckets to catch leaks, cordoning off affected areas, and using dryers and carpet cleaners to attempt to deal with the effect of the water; and
- the significant health and safety concerns from falling ceiling tiles, mould exposure, inadequate lighting due to the electrical problems caused by the leaks, tripping hazards, and cold temperatures resulting from the necessity to turn down the heat to prevent mould growth.<sup>41</sup>

The report concluded:

All of the above mentioned health and safety concerns are secondary issues being caused by the primary health and safety concern which is the leaking roof.

In 2005 when the library staff created the leak procedures they were developed as a temporary fix to cope with the problems they were experiencing. The procedures were created on the assumption that the primary health and safety concern, the leaking roof, would be repaired by the Landlord.

#### **Conclusion and Recommendation**

Since 2005 the water leaks in the Library have been getting worse, more areas of the Library are leaking now which were not leaking before.

The Library staff have always struggled to protect the Library's assets from water damage, to clean up the mess, and to prevent the growth of mould but the roof is leaking so badly now there is no time for anything to dry before it leaks again and mould is growing throughout the Library anyway.

The Landlord has known for many years that he will have to invest a large amount of money into the building if he is going to properly repair the leaking roof. Since 2005 the Landlord has had many chances to try alternative products and various means of fixing the roof, all of which were unsuccessful. If the Landlord is not going to invest the money to repair the roof it is not recommended that the Library stay in the Algo Centre Mall.

The Library staff has been, and is still working in, a hazardous work environment. Although steps have been taken to ensure the workers are operating as safely as possible in such hazardous conditions, more must be done to protect the health and safety of the workers.

It is important to remember that under the Occupational Health and Safety Act,

**An employer shall take every precaution reasonable in the circumstances for the protection of the worker.** – Occupational Health and Safety Act Part III S. 25(2)(h)

The Library lease is soon to expire. Now is the perfect opportunity for the Library to relocate into a much more healthy and safe environment. If the Library moves to a different location all of its present health and safety concerns will be eradicated, and as an employer the City will have taken every reasonable precaution in the circumstance to protect the worker.

The recommendation of the Joint Health and Safety Committee from May 12, 2005 remains, in the interest of health and safety the Library should move to an alternate location. The Library should move once the lease has expired as it appears that the problem with the leaking roof is not going to be fixed.<sup>42</sup> [Emphasis in the original.]

On March 12, 2008, the same day that Ms. Williams's report was prepared, the senior City management team met together. This group consisted of, among others, Mr. Bauthus, Ms. Morin, Ms. Leddy, Lesley Sprague (City clerk), Danielle Vincent (assistant to the mayor), Dan Gagnon (director of project tourism and leisure), and Rob deBortoli (the operations manager who would later become chief administrative officer). The minutes of the meeting show that more mould had been found in the Library the previous week and that it had been cleaned up; that the Library wanted council to reconsider if it was leaning toward renewing the existing lease, because the premises were a "toxic environment"; and that one staff member had complained that her eyes were burning and another had developed a chronic cough as a result of the mould issues.<sup>43</sup>

Mr. Bauthus admitted that

- he had read Ms. Williams's report and that it was true and accurate in every single particular;
- the recommendation of the Joint Health and Safety Committee was the only recommendation its members could make to protect the safety of the workers;
- he agreed with the recommendation; and
- he was given instructions at the end of the day by the mayor and the council to negotiate the lease.<sup>44</sup>



As discussed below, the documentary and oral evidence corroborates Mr. Bauthus's evidence about the instructions he received.

On March 17, 2008, Ms. Morin emailed Ms. Williams, copying Mr. Bauthus, advising that, over the previous weekend, the Mall maintenance staff had installed another diaper with a hose leading to a bucket above the ceiling tiles and a light fixture. She told them that she had taped off and put a warning sign on the light switch for that light bank. She also told them that half the fiction collection and one row of junior fiction books were under tarps. Councillor Dawn Morissette forwarded the email to Mayor Hamilton and her fellow members of council, writing, "Guys, I'm starting to get worried about the health and safety implications of having City staff working in the mall." Councillor Collett replied the same day: "So am I. I have already spoken to Sue [Morin] regarding this matter. It is a serious concern."<sup>45</sup>

Mr. Collett testified that his "serious concerns" were the health issues of the employees and citizens going through the Mall or entering the Library. He thought that the ceiling tiles, which were ballooning as a result of the water accumulation, might fall on the patrons. He thought that the owner should be pressured to fix the roof once and for all.<sup>46</sup>

On March 18, the day after this email exchange, Mr. Bauthus met with Mayor Hamilton about the situation at the Library. He may have also met with council at that time, but the evidence is unclear. Although Mr. Bauthus wrote a memo on March 25, 2008, to the mayor and council saying, "Further to our meeting on March 18, 2008, respecting the library ...,"<sup>47</sup> Mr. Bauthus testified that he did not meet with all councillors but only with the mayor. There was no regular council meeting on March 18, 2008. If he had met with the mayor and council, it would have been an illegal meeting. In any event, there are no minutes or notes recording what was said at that meeting. What is clear is that a meeting took place and that Mr. Bauthus was given directions.<sup>48</sup>

Mr. Bauthus's evidence was that the directions he received from Mayor Hamilton were always consistent with the mayor's attitude that the Library was important to the Mall, and that the Mall was important to the City and to Retirement Living – the not-for-profit corporation charged with attracting seniors to the area.<sup>49</sup> That interpretation was certainly the case with the instructions he received in this instance.

On March 20, 2008, Mr. Bauthus met with Ms. Morin, Bob Nazarian, Mr. Clinckett, Mr. England, and Alex Sennett (who had been retained by Mr. Nazarian to install a security system at the Mall). As I explain below, Mr. Sennett later played a role in the manner in which Eastwood dealt with the roof deck leaks. Mr. Bauthus's memo of March 25, 2008, reported on that meeting:

Initially we discussed the problem with the water and Bob informed me that he will be undertaking as soon as weather permits, a complete reconstruct of the parking deck to include the placement of a water-proof membrane and the asphalt on the deck as well as other remedial action in order to reduce the immediate impact of the water on the deck. It was explained that the water-proof membrane was never placed on the deck under the asphalt and the absence of this membrane is what permitted the leakage over the years. In addition to the meeting, Mr. Nazarian and his associates agreed to meet with Mrs. Morin to discuss the immediate issues resulting from the leaks and these include the following:

1. Ceiling tiles to be replaced;
2. Air scrubbers to be installed;
3. More tarps to be installed;
4. Electrician to inspect lights before turning them back on;
5. Electrician to disable lights that are left on after hours; and
6. Carpets to be cleaned as soon as possible.

All of these are to be done at the malls [*sic*] expense.

We discussed the lease and Mr. Nazarian said that the space currently occupied by Retirement Living is taken up when Retirement Living vacates and accordingly, is not available for our consideration.

Mr. Nazarian indicated that they would be spending a significant amount of money to fix the leaks and the expansion to the 10,000 square feet would not be an issue in the existing space. Mr. Nazarian further indicated that the best he would do for the City would be \$13.00/foot and he would undertake to do all the leaseholds necessary to accommodate the 10,000 square feet in the space presently occupied by the library. These leaseholds would include complete refitting of flooring, walls, ceiling and partitions necessary to accommodate the programming and library areas.

Because of the water damage, Mr. Nazarian also committed to replace or refurbish the metal shelving that has rusted. Also, he would undertake to review the HVAC and make changes that would improve the air quality. When we discussed the term, the mall requested our consideration of a long term lease, however, the mall would be amenable to a 5 year lease and a 5 year renewal bearing in mind that with the renewal, the rate would go up.<sup>50</sup>

Mr. Bauthus testified that, although he recognized that the issues of mould, dampness, and electrical problems identified in Ms. Williams's March 12 report were health and safety issues, he never considered reporting them to the Ministry of Labour. He also admitted that the work, which Bob Nazarian had committed to at the March 20 meeting, would require a building permit. He did not, however, alert Mr. Allard about these plans. Although he agreed that the emails and reports from Ms. Williams, Ms. Morin, and others were all written complaints of breaches of the Property Standards By-law, which should have been investigated by the property standards officer under the City's enforcement policy, he did not refer any of them to Mr. Allard. It was his evidence that he did not do so because the landlord was "continuing to work on those issues" and "trying to remediate that ... problem."<sup>51</sup>

Mr. Bauthus was asked why he had combined in his report to council the issue of fixing the leaks with the renewal of the Library's lease. His answer was that Bob Nazarian had combined the two issues – telling the City both that he would be fixing the leaks and that he wanted the Library to continue to lease space from him.<sup>52</sup> I note that Mr. Nazarian was proposing a significant rent increase – from the rate of just over \$8 a square foot to \$13.<sup>53</sup>

The promises that Bob Nazarian had made to the City, as recorded in Mr. Bauthus's memo to council, were hollow. As I explain below, Mr. Clinckett had sent him a report just one week before which advised him that a membrane and asphalt covering could be applied to the roof. As Mr. Nazarian admitted in his evidence before me, he had no idea what that would cost and had no contract in place to do it. He testified that he was not concerned about this situation because "[w]e were decided to do it."<sup>54</sup> As events unfolded, however, it was never done.

On March 25, City Council met and went into closed session to deal with the issues relating to the Library. The public minutes state that the issue "dealt with the acquisition of property owned by the Municipality," one of the reasons that, under the *Municipal Act*, justifies closed meetings.<sup>55</sup> The minutes of the closed session describe the discussion:

The CAO [chief administrative officer] outlined the details regarding water leakage problems that the library has been experiencing in the mall. The Mall owners have promised to remedy the water problems. The space where ELRL [Elliot Lake Retirement Living] is located is committed already. The 10,000 square feet has been promised. Leasehold improvements will be done by the owner. And he wants \$13 per square foot. We want a 5 year term and a 5 year renewable. He wants a 20 year lease. We want to include the library in our recreation master plan. We play [*sic*] no common charges.

Councillor Reinhardt stated that we should still be looking for alternative locations (back up plan).

The mall is still the most desirable location.

Get the library into the Multiplex issue? This is 5 years plus down the road at least.

The five year term is at a price.

White Mountain, Collins Hall, a school we could buy.

*The CAO was directed to negotiate a 5 year lease including certain caveats.*

The ability to provide programming would be an appropriate improvement for the library space.

A special meeting of Council with the Library Board would be advisable.<sup>56</sup> [Emphasis added.]

Mayor Hamilton testified that he knew that the Library wanted out of the Mall because of the leaks. He also testified that the Mall was a desirable location only if the leaks were fixed.<sup>57</sup> Mr. Collett testified that he believed he made the statement that the Mall was the most desirable location. He had wanted to renew a lease in the Mall space, but only on the condition that “the repairs would ... be totally fixed and guaranteed ... never [to] leak again.”<sup>58</sup>

Mr. Bauthus testified that the reference to the Mall being the “most desirable location” reflected the general view of councillors. When asked how that could be the general view, given the leaks and their effect on the Library and its patrons, he said he thought that councillors were making the assumption that the landlord was going to fix the leaks. That assumption could only have been made on the basis of Bob Nazarian’s hollow promise. Mr. Bauthus understood this limitation. He also knew that the way to fix the leaks was to install a membrane. But he took no steps, at any time, to determine whether a membrane was being installed. He did not check with the Building Department to see if a building permit had been issued. Nor did he follow up with Bob Nazarian to see what he was doing about the problem.<sup>59</sup>

Mr. Bauthus did write to Bob Nazarian, on April 7, 2008, stating:

It is important that we see positive action both to assist us with the aftermath of the leaks and to have an expectation that the infiltration issues will be resolved on a permanent nature in the near future.<sup>60</sup>

No such positive action was ever seen. Nor, it would appear, did anyone from the City look for signs that it was taking place. Mayor Hamilton, who received a copy of this letter, never followed up with Mr. Bauthus to see what action Eastwood was taking.<sup>61</sup> Bob Nazarian never told Mr. Bauthus just how he was fixing the leaks permanently, other than his indication in the March 20 meeting that he would be installing a membrane.<sup>62</sup>

On April 24, 2008, Mr. Bauthus sent an email to Mayor Hamilton setting out an email he proposed to send to Katherine Croxson, the chair of the Library board. The proposed email was as follows:

I am following up with my discussion with Sue respecting the outcome of the special F&A meeting that was held to discuss the Library issues.

It was my understanding that the Council would not be making any decision until we had an opportunity to see whether or not the mall is prepared to do the work promised to address the water infiltration from the parking lot above. At the time the work has been completed the options would be revisited, however, the feeling I have from that meeting and from subsequent conversations with members of Council is that there is no appetite at this time to expend \$4,000,000 on a library or any other facility. Council also has concerns on the impact of the moving of the library on the mall. This too will have to be addressed as part of the final decision process.

The strategic plan and the Parks and Rec master plan are being undertaken and completed this year which will provide direction and rationale for major capital projects to be considered for the future.

Notwithstanding the outcome of the remedial work on the roof, any rental agreement with the mall will have provisions to cover issues such as water infiltration, occupancy / vacancy limits and maintenance, all of which was discussed with Bob Nazarian and he indicated that he did not have an issue with these covenants on the agreement.<sup>63</sup>



As Mr. Bauthus admitted in his evidence, council had not told him that it would not be making any decision until it saw whether the Mall was prepared to do the work promised to address the water infiltration.<sup>64</sup> As the minutes of the March 25 closed meeting illustrate, and as Mr. Bauthus testified, he was directed by council to negotiate a lease with the Mall for the Library. As the evidence shows, that is what he proceeded to do, and the leaks did not stand in the way of that goal.

Mayor Hamilton did not tell Mr. Bauthus that he ought to remove the portion of his proposed email that inaccurately described the direction he had received from council. He responded to Mr. Bauthus's request for comments by saying, "Fine with me. A little less emphasis on saving the mall would work."<sup>65</sup> Mr. Bauthus testified that Mayor Hamilton wanted, in his words, to "save the mall," and he thought that, in order to save the Mall, the Library had to stay there.<sup>66</sup> Mayor Hamilton resisted the suggestion that council agreed that the Library was important to the Mall, testifying: "What they did agree is that the location in the Mall, notwithstanding the leaks, was certainly a preferred location and that is what the patrons were telling the Library Board."<sup>67</sup> He agreed that council was of the view that the Library was important to the economic viability of the Mall if there was not a replacement for it in the space it occupied.<sup>68</sup>

It appears to me that Mayor Hamilton's admonition to Mr. Bauthus that "a little less emphasis on saving the mall would work" was a suggestion that stressing the importance of the Mall to the community, and of the Library to the Mall, was not likely to convince Ms. Croxson, even though that was the motive behind the mayor's desire to keep the Library in the Mall.

### **Citizens' complaints about the leaks at the Mall are not sent to the property standards officer**

The failure of City officials and councillors to direct complaints about the physical condition of the Mall to the property standards officer continued. On April 4, 2008, Ms. Croxson sent an email to a number of people, providing the mayor's email address and telephone number, and writing:

The library is in extremely poor shape ... there is now mould in the library and lights have had to be out for over 3 weeks because of the leaking. As well there are tarps over book cases, "diapers" and hoses coming from the ceiling and a very unsavoury atmosphere. There are people who will not come into the Library for fear of something coming down on them ...

*Staff and the Board are not listened to ... the only way something can be done is if every citizen who cares about our library and its disgusting condition calls the Mayor's office to state that. At the moment we are told that no one has called to complain ... that's a travesty!*<sup>69</sup> [Emphasis in the original.]

The email produced results. On April 5, 2008, S. Pomerleau, a resident of Elliot Lake, sent an email to the City's general mailbox stating that she was "appalled at the condition of the library."<sup>70</sup> On April 7, 2008, Cindy Britton-Foster, another resident of Elliot Lake, sent an email to that mailbox expressing her concern about the effect of the "slow dripping leaks" on the Library and noting that the problem was "throughout the mall."<sup>71</sup> On April 5, 2008, Claire Diotte-Hart, a retired teacher and local resident, sent an email complaining about the "deplorable conditions in the Mall" and the "damaged books from the leaky roof."<sup>72</sup> All emails were sent to Mayor Hamilton, Mr. Gagnon, and Natalie Bray, the mayor's executive assistant, the last with a note that described it as "[o]ne more library support email." On April 4, 2008, Basil Jesshope, an 86-year old resident, wrote a letter to the mayor complaining about the physical condition of the Library, calling it "absolutely deplorable to the degree that I feel it must be closed even if we are left without a public library."<sup>73</sup> These communications were not forwarded to the Building Department.<sup>74</sup> Mr. Clouthier testified that, had he been provided with them, he would have investigated the issues complained of.<sup>75</sup> But nobody did that – even though the Building Department was right across the hall from the offices of both Mayor Hamilton and Mr. Bauthus.

When asked why these emails had not been forwarded to the property standards officer, Mayor Hamilton twice said that they were the result of a mass email from the board chair. He agreed, however, that this detail should not have affected the way in which they were dealt with – and, rather, that they were an indication that maybe the City ought to be doing something about the problem.<sup>76</sup> Yet it did not.

### **The City's inaction is not inadvertent**

Mr. Bauthus was asked about his failure to deal with the leaks at the Library following Ms. Williams's January 9, 2008, report. He gave this evidence:

Q. Did ... your inaction have anything to do with the attitude towards the importance of the library to the mall and the mall to the community and Retirement Living that you've just told us about?

A. No.<sup>77</sup>

I simply cannot accept this evidence. For the reasons I have already expressed, I conclude that the inaction of the City generally, and Mr. Bauthus in particular, over this period was the result of what he understood to be the prevailing attitude about the importance of the Library to the Mall, and of the Mall to the community and to Retirement Living.

### **Tenants continue to complain to Eastwood**

#### **Bank of Nova Scotia authenticates and documents its concerns**

On March 5, 2008, an internal Bank of Nova Scotia email sought approval to have an air-quality assessment done. The document summarizes the bank staff's situation:

Branch has experienced ongoing water leaks over the past few years. ServiceMaster has been commissioned to perform cleanup / drying procedures however staff and customers have noted a musty odour in the premises. Landlord has inspected the rooftop and has done a temporary repair job pending permanent repairs in Spring.

Branch advised that visible mould was found to be present on carpet and boxes in the encasement around the vault area and that there are several areas with notable water damage including the PBO offices, stationary room and in front of the manager's office.

Branch further advised that several staff members have been experiencing health symptoms such as headaches and lethargy. There is an apparent lack of fresh air into the branch – HVAC unit is Landlord maintained.<sup>78</sup>

Judy McCulloch, manager of customer service at the bank, testified that leaks occurred everywhere throughout the branch, other than in the bathroom and the vault, whenever it rained in any amount or when the snow melted on the roof. It was her evidence that the premises leaked all year long. She described ceiling tiles collapsing on desks and, on one occasion, on a teller's head. Tiles were constantly being replaced. She described one occasion when every tile in the branch was replaced. Staff devoted hours every week just to dealing with the situation – during the times when the leaks were particularly bad, some staff would devote their entire day to the problem.<sup>79</sup> They were forced to place both totes and buckets under the leaks because the buckets alone were not sufficient to hold the water (see figure 1.9.1).<sup>80</sup>

**She described ceiling tiles collapsing on desks and, on one occasion, on a teller's head. Tiles were constantly being replaced. She described one occasion when every tile in the branch was replaced.**



**Figure 1.9.1 The Scotiabank premises following a rainstorm**

Source Exhibit 5127

On March 18, 2008, Pinchin Environmental (Pinchin) delivered its initial finding and recommendations to the Bank of Nova Scotia following its inspection of the bank for moisture damage and air quality. Although no air-quality problems linked to moisture had been observed, mould growth had been found on drywall collected from two different places in the space occupied by the bank. The Pinchin engineers recommended that the roof leaks be repaired and the water-stained ceiling tiles be replaced. They also recommended that significant repairs be made to the premises: removal and disposal of all the drywall and insulation; removal of the vapour barrier on the bottom four feet of the south wall of the bank, along with significant portions of the drywall on the

other walls and part of the ceiling; drying of all the remaining building materials; and remediation in accordance with a plan involving appropriate inspections and tests.<sup>81</sup>

Bob Nazarian received a copy of this report. He testified that, when he received it, he retained M.R. Wright and Associates of Sault Ste. Marie to carry out a mould inspection of both Zellers and Scotiabank. It was his evidence that the bank would not allow the environmental inspector access to its premises to carry out the testing. Mr. Nazarian did not, however, dispute Pinchin's findings.<sup>82</sup>

### **As Zellers continues to suffer from leaks, Eastwood misleads it about Scotiabank's test results**

On February 13, 2008, Brian Cuthbertson, the manager of the Zellers store in the Mall, was told by a fire inspector that all the ceiling tiles, which they had removed because of water damage, had to be replaced within 30 days. A similar order was made to other stores. Mr. Cuthbertson testified that "skids and skids" of tiles were purchased by the Mall for this purpose.<sup>83</sup> Of course, the ensuing replacement did not do anything to solve the problem. It just cleaned up the visible damage, while the invisible damage persisted.

The visible damage within the store continued as well, because the leaks were not repaired. On March 12, 2008, Mr. Cuthbertson sent Ms. Taylor at Hudson's Bay Company a set of photographs showing the troughs and other equipment installed by Eastwood that day to deal with the leaks (see figure 1.9.2). They also show tarps installed above or below the ceiling tiles to collect the water as well as hoses draining into buckets and bladders.<sup>84</sup> Mr. Cuthbertson testified that about 12 bladders were installed during the worst period of leaks. They were not sufficient to capture all the water, however, and the trough proved to be inadequate as water continued to stain other tiles.<sup>85</sup>



On March 18, 2008, Mr. Cuthbertson sent an email to Ms. Taylor advising her that an associate had questioned the air quality in the store and told him that some associates might become ill from mould on the tiles. He reported that he had over 400 stained tiles. He testified that all these tiles were replaced.<sup>86</sup>

Later that day, the same day that the Pinchin report was delivered to Scotiabank, Ms. Laroue, the assistant Mall manager, emailed Ms. Taylor, stating:

We were just informed that the Bank of Nova Scotia which is directly beside Zellers here in the mall in Elliot Lake had air quality and air contaminates testing done on Friday March 14, 2008. The report indicated that everything was fine.<sup>87</sup>

This email was, at its most generous, misleading. Everything was not fine. Although the Pinchin report indicated no problems with air quality caused by moisture, it did identify problems with mould which required extensive remediation.

Mr. Cuthbertson's evidence was that Ms. Laroue had told other tenants in the Mall that the air-quality tests done by the bank had shown no problems.<sup>88</sup> He advised Ms. Taylor by email on March 24, 2008, that he had just been notified that the bank's consultant had located mould in the wall adjacent to the Zellers store.<sup>89</sup>



**Figure 1.9.2** Conditions in the Zellers store, March 2008

Source Exhibit 12-40

## Mr. Clinckett reports that the structure could not support a roof but could support a membrane plus an asphalt covering

**If a roof were to be constructed, it would have to be supported by a free-standing support system outside the building structure.**

On March 8, 2008, Mr. Clinckett delivered a document to Bob Nazarian entitled “Structural Report.” He stated that, after reviewing the construction drawings, both architectural and structural, the 1999 Halsall report, and some notes he received from Coreslab, the supplier, about the structural capacity of the slabs on the roof, the “structural calculations for columns, floors, roof deck, beams, & base plates were all designed for the existing structure as it was envisaged by the extent of the work.”<sup>90</sup> This conclusion was not Mr. Clinckett’s. He explained, contrary to his previous evidence, that he had consulted Tim Fisher, an engineer (who may have been retired by this time) with whom he had worked in the past. Mr. Fisher’s conclusion, relayed to Bob Nazarian by Mr. Clinckett, was that the building could support what it was being used for and no more. If a roof were to be constructed, it would have to be supported by a free-standing support system outside the building structure.<sup>91</sup> Mr. Clinckett’s report went on to say:

The roof deck slabs were designed to carry automobile, snow, & topping loading; a diversity factor would include for the addition of a waterproof membrane and asphalt finish.<sup>92</sup>

He testified that this sentence meant that the total weight capacity of the deck was calculated using the assumption that it would support both eight feet of snow and cars. Since snow accumulation of three to four inches was typically cleared from the roof deck, the deck would never have to support both that much snow and vehicles. This concept, which he described as a “diversity factor,” allowed Mr. Clinckett and Mr. Fisher to conclude that the roof could support a waterproof membrane and asphalt covering. Since the snow load and vehicle load used to calculate the capacity of the roof were each 50 pounds per square foot (psf), and the weight of a membrane and asphalt overlay was between 28 and 30 psf, the absence of either the snow load or the cars at any given time would, in Mr. Clinckett’s opinion, allow a membrane and asphalt overlay to be supported.<sup>93</sup>

This conclusion was not dissimilar to the opinions expressed to Algocen in 1995 by Eric Liu, the professional engineer with Alex Tobias Associates Limited, and engineer Paul Meyer in 1996, although they had indicated that a lighter “thin” membrane and asphalt covering weighing no more than 20 psf could be supported by the roof deck.

Mr. Liu had written that the deck could sustain the “basic snow and rain load of 53 psf or 50 psf vehicle load as well as 20 psf superimposed 20 psf dead load,” and so “a 20 psf maximum weight of new waterproofing system could be added to the existing hollow core slabs with bonded concrete topping.”<sup>94</sup> Dr. Hassan Sarrafini of NORR agreed with that analysis.<sup>95</sup> Mr. Meyer’s 1996 report concluded that the live load being borne by the roof deck was approximately 50 psf – on the basis that it would not be supporting more than the car load of 50 psf or the snow load for a roof in Elliot Lake, which he reported was 44 psf.<sup>96</sup>

## Bob Nazarian knows he has to appear to be doing something to deal with the leaks

By the end of March 2008, all three of Eastwood's major tenants – the Library, Zellers, and the Bank of Nova Scotia – were making serious complaints about the leaks and demanding that they be fixed. Bob Nazarian had made promises, at least to the City, Zellers, and Northern Reflections, that the leaks would be permanently fixed by installing a membrane. Mr. Nazarian admitted that he knew by this point that, if he continued to repair the roof in the same way as in the past, it would continue to leak.<sup>97</sup> I conclude he had no choice – he had to give his tenants the illusion that he was moving forward with the repairs he had promised.

## Eastwood issues a call for tenders to install a membrane, names the winning bid, and reneges on the offer

On April 8, 2008, Mr. Clinckett issued a call for tenders, with bids closing April 17. The tender documents described the work required as

preparation work on the existing 3" concrete topping on the Coreslab plank roof structure; placement of a Hot Fluid-Applied membrane, expansion joints, protection board, & asphalt wear surface.<sup>98</sup>

A number of bids were received, and Bob Nazarian decided to award the contract to C3 Harrell Inc. (C3 Harrell), which had submitted a bid for \$903,241.50.<sup>99</sup> Mr. England was quick to spread the news to the tenants. On April 21, 2008, he emailed Ms. Morin to tell her that a contractor had been awarded the project and would start on May 12.<sup>100</sup> After agreeing to a contract with C3 Harrell, however, Bob Nazarian backed off and refused to sign it.

Mr. Clinckett testified that Harry Hakomaki, the president of C3 Harrell, told him that he could not get a credit rating for Eastwood. He asked Bob Nazarian to pay for the cost of the waterproofing material, and Mr. Nazarian refused.<sup>101</sup> Mr. Nazarian admitted that he had asked C3 Harrell to put up \$250,000 for the materials because he was "not comfortable" paying that much money to a company he did not know. He was not prepared to have Eastwood pay for the materials.<sup>102</sup>

Bob Nazarian's evidence was that the dispute over payment was not the main reason that he refused to sign the contract. He testified that he became concerned about the weight of the system and the ability of the structure to support it. He said he had done a computer search on this issue and decided he needed a second opinion to support Mr. Clinckett's opinion.<sup>103</sup>

I heard evidence that Bob Nazarian had been warned by this time that, if he did not fix the roof, his building would collapse. Mr. England testified that he heard Mr. Clinckett say that to Mr. Nazarian at the Mall, after he had decided not to go ahead with the contract with C3 Harrell.<sup>104</sup> Mr. Nazarian denied having been given this information by Mr. Clinckett.<sup>105</sup> When Mr. Clinckett testified before the Commission, he was not asked if he had given this warning. He did, however, state that he did not look at the supporting steel under the roof and that he did not come to any conclusion about the structure of the Mall when he was working on the roof project. He also said that he saw nothing in his inspection that gave him concern about the safety or structural integrity of the building. Mr. Clinckett is an architect, not an engineer.<sup>106</sup> He testified that he sought advice from an engineer before providing an opinion on the capacity of the roof as designed to support the additional load of a membrane and asphalt topping. It is unlikely, in my view, that he would have given an opinion as to the capacity of the building to support itself if it was not repaired. I am hesitant to rely on Mr. England's uncorroborated evidence alone. I cannot safely conclude that Mr. Clinckett warned Mr. Nazarian in the way that Mr. England described.



## **Eastwood makes a false public announcement that a contract has been signed to fix the roof**

On April 30, 2008, the *Elliot Lake Standard*, the local newspaper, ran a front-page story with the headline “Mall aims to plug long-time roof problem” and a picture of Mr. England, Mr. Clinckett, and Mr. Hakomaki standing on the roof. The story stated that the plan was to place a rubberized membrane on the roof, cover it with a protective covering, and then apply a 3-inch layer of asphalt. Mr. Hakomaki was quoted as saying they planned to start the work in “a couple of weeks.” Mr. England was quoted as saying that Eastwood had “two engineering reports that stated that the structure could support the weight” and (citing a project cost of just under \$1 million) that Bob Nazarian was “putting a lot of money into this mall.”<sup>107</sup>

This article contained false statements. Eastwood did not plan to start “in a couple of weeks.” In fact, the contract had not yet been signed. Eastwood did not have two engineering reports that said the structure could support the weight; it had one report from Mr. Clinckett, who is an architect. Bob Nazarian admitted these statements were not true. He testified that he told Mr. England to “take care of this false advertising, and do not make another mistake like this.”<sup>108</sup>

## **May 2008 to fall 2008: As Eastwood looks for money, the roof is damaged by a contractor**

### **Eastwood attempts to borrow more money from the Royal Bank, but the bank threatens default**

On May 12, 2008, lawyer Paul Mand was retained by Bob Nazarian to represent Eastwood in an attempt to borrow more money through the Royal Bank, the administrator of Eastwood’s mortgage on the Mall. On May 13, Mr. Mand emailed Jim Davison of the Royal Bank, writing:

I confirm that I have been retained by Mr. Nazarian, the principal of Eastwood Mall Inc., and that our client wishes to refinance his property in Elliot Lake for the purposes of completing renovations integral to the future success of the commercial mall. In short the renovations are so imperative, that if they are not completed the future viability of this commercial venture could be lost. I further confirm that you advised that the mortgage could not be refinanced in the traditional sense because RBC was not the mortgagee; and rather another entity through Computer Share as trustee was the mortgagee. You offered another solution and suggested that a bond be used to replace the revenue stream returned by the mortgage to the mortgagee.

As a result of our conversation you advised me that you would provide me with a defeasances quote. I await your response.<sup>109</sup>

Bob Nazarian testified that the “defeasance” proposal suggested by Mr. Davison was not useful to him. It would have required him to buy a bond which would then be used to pay the mortgage payments as they came due. The cost of doing so would have been almost \$4.7 million.<sup>110</sup>

Mr. Mand did not pursue this proposal, but on May 23 Mr. Davison emailed him again. He wrote:

Mr. Mand has Mr. Nazarian decided if he will be proceeding with the defeasance? In addition per the attached email we will require current financial information on the property. As this was due by the end of March 2008 this constitutes a non monetary default under the mortgage. The loan cannot be defeased if it is in default. Please have Mr. Nazarian provide the requested information by May 30, 2008.<sup>111</sup>

The attached email asked for Eastwood's financial statements for the 2007 fiscal year, a current rent roll, and copies of any new leases signed in the previous year.<sup>112</sup> This request for financial information was the first of several such requests from the Royal Bank to Eastwood which would impede Bob Nazarian's efforts to borrow money over the coming years.

## **Bob Nazarian seeks a cheaper price for fixing the leaks but does not find one**

Andrew Holford is a professional engineer who was employed with the engineering firm Kleinfeldt Consultants Limited in 2008. He graduated from McMaster University with a bachelor of engineering in 1993 and has practised continuously as a structural engineer, including building science and restoration.<sup>113</sup>

On Monday, May 26, 2008, at 5:30 p.m., Mr. Holford received a telephone call from Bob Nazarian, a friend of his father. Mr. Nazarian wanted to meet him as soon as possible; when Mr. Holford told him that he was busy the next morning, he insisted on meeting that evening. Mr. Holford went to Mr. Nazarian's home in Richmond Hill. Bob Nazarian told him that he had a shopping mall that required waterproofing. He had a proposal and pricing for a waterproofing system that had been designed by someone else, and Mr. Holford understood that he wanted him to review that system and give his opinion as to whether the pricing was reasonable.<sup>114</sup>

Mr. Holford described Bob Nazarian as very eager to get the work underway as soon as possible. He wanted the project completed that summer. Mr. Holford arranged to travel up to Elliot Lake four days later, on Friday, May 30, together with a colleague from Kleinfeldt and Tony Crisostimo from Conterra, a contracting firm with whom Mr. Holford had worked and from whom he was hoping to get information about a possible price for the waterproofing work. They arrived after dark Friday evening and went to the Mall the next morning. They reviewed drawings showing the Coreslab detail, some structural design, and some architectural details for flashings. They were not given the original Coreslab shop drawings. They asked for copies of any prior engineering reports\* and were told that none were available.<sup>115</sup>

That was not true. Bob Nazarian had access to, at a minimum, the 1999 Halsall report. Mr. Turner testified he had sent it to Bob Nazarian in February 2007.<sup>116</sup> It was referred to in a letter from Mr. Clinckett to him on May 13, 2008, which Mr. Nazarian admitted receiving and reading.<sup>117</sup> Mr. Holford testified that, if he had received that report, it would have been helpful to him.<sup>118</sup>

Mr. Holford and his colleagues inspected the deck to review the waterproofing options for a hollow core slab with a concrete topping deck over occupied space. They were trying to determine if the system proposed by Mr. Clinckett should be used or whether a different system could be devised that would be more cost-effective. Mr. Holford noted that many repairs had been carried out on the deck over the years and some of them were incomplete. Not all deterioration had been removed when repairs were done; some caulking had failed; and some damaged concrete had not been repaired but simply covered with more caulking. They looked to him like quick repairs that would have to be redone as part of a large-scale restoration project. Although they did not inspect the interior, they did see buckets, stained and missing ceiling tiles, and tarps being used to direct water to buckets.<sup>119</sup>

\* Bob Nazarian, when asked repeatedly whether Mr. Holford had asked for earlier engineering reports and refusing to give a direct answer, finally testified that he did not remember. See Bob Nazarian testimony, July 24, 2013, pp. 17872–3.

They returned to Toronto after spending about three hours on the deck and 15 minutes inside the Mall. Mr. Holford reviewed the scope of work prepared by Mr. Clinckett and concluded that it was a common thick-membrane hot rubberized system, reinforced and covered with a 3-inch wear coat of rubberized asphalt. A number of details that would typically be included in the scope of work were missing.<sup>120</sup>

He asked Conterra to prepare a bid based on Mr. Clinckett's proposal. Mr. Holford could not recall the exact price Conterra proposed, but he testified it was comparable to the price quoted by C3 Harrell (which Bob Nazarian had already said he had accepted) and reasonable. He sent that to Bob Nazarian shortly after June 4, 2008, but Mr. Nazarian rejected it. He told Mr. Holford that he had wanted an improvement on the price proposed by C3 Harrell.<sup>121</sup>

## **Bob Nazarian unsuccessfully appeals to ELNOS and the City for money**

### **Bob Nazarian attempts to convince ELNOS to take part in a deceptive scheme to finance the beginning of repairs**

William Elliott is the general manager of the Elliot Lake and North Shore Corporation for Business Development (ELNOS), created in 1992 following the cancellation of the uranium supply contracts that had sustained the uranium mines in Elliot Lake. Ontario Hydro provided funds to compensate for the effects of the mine closure, and some of those funds were used to establish ELNOS, which helps sustain and diversify the economy of Elliot Lake and surrounding communities. ELNOS provides, among other things, loans to businesses in the area and is willing to take on a higher risk than a bank for such loans. Mr. Elliott reports to a board of directors composed of volunteers nominated by each of the five communities served by the corporation, together with representatives from each of the education, labour, and business sectors. It has no relationship, formal or informal, with Elliot Lake Retirement Living. Although individuals who were members of the board of ELNOS may have, from time to time, also been members of the board of Retirement Living, this dual role was coincidental.<sup>122</sup>

On May 30, 2008, Bob Nazarian and Mr. England met Mr. Elliott and Steven van Duin, the chair of the ELNOS Board of Directors, at the ELNOS office in Elliot Lake. Mr. Elliott testified with his memory refreshed by the notes he made during the course of the meeting.<sup>123</sup> Bob Nazarian started the meeting by saying he was the owner of the Mall, and the roof was a significant issue that needed to be dealt with. Mr. Elliott's notes indicate "roof issue – problem with original installation – no waterproof membrane (was in 1989 [*sic*; probably meant 1999] report, but not disclosed to Nazarian)."<sup>124</sup> Mr. Nazarian admitted telling Mr. Elliott that the problem with the roof was caused by the membrane not having been installed during construction, but denied telling him that the absence of a membrane was in an earlier report not disclosed to him.<sup>125</sup>

As I have indicated, Bob Nazarian was told of the 1999 Halsall report on at least two earlier occasions. I conclude from Mr. Elliott's note that, by May 30, 2008, at least, Mr. Nazarian had read it and knew of the potential for structural damage if the roof was not dealt with in one of the two ways proposed by its authors. His seeming acceptance of Mr. Clinckett's proposal for a membrane, and his promises to his tenants, the City, and the public that a membrane would be installed, may well have been a result of his review of the Halsall report.

Bob Nazarian told Mr. Elliott that he had a restrictive mortgage that prohibited a second mortgage and would impose high penalties if breached. He also told him that it was going to cost \$980,000 to fix the roof (the amount of the C3 Harrell quote that he had orally agreed to) and that Zellers, the Library, Scotiabank, and Northern Reflections had all threatened to leave if the leaks were not fixed. He indicated that he would be meeting with Mayor Hamilton and Mr. Bauthus to attempt to get financial support from the City – potentially, tax relief.<sup>126</sup>

Mr. Elliott said that they discussed using one of Mr. Nazarian's other companies' properties as security for a loan, but Mr. Nazarian told him that he had access to only about \$200,000 of cash from other sources.<sup>127</sup>



Mr. Elliott testified that Mr. Nazarian told him that “the contractors and engineers are here and they’re working” – a statement corroborated by his note saying exactly that, with the word “here” underlined. Mr. Elliott also testified that Bob Nazarian told him that the contractors who were working had successfully completed two other very similar jobs where there were leaking parking lots over a development. The statement that the contractors were there and working surprised Mr. Elliott – his office looks out directly on the Mall, and he had seen no evidence of any work being done beyond the regular activity on the roof.<sup>128</sup>

Bob Nazarian denied telling Mr. Elliott that contractors were already working on the roof. He testified that he told him that they were “in the process of working on the roof the old-fashioned way of caulking and so on.”<sup>129</sup> I accept Mr. Elliott’s evidence. There were no such contractors. The contract with C3 Harrell had not been signed.<sup>130</sup> A representative of Conterra had travelled from Toronto with Mr. Holford the day before to look at the Mall and to consider a bid to do the work in accordance with Mr. Clinckett’s plan, but he was not working on the roof. Nor were “engineers” working there. Mr. Clinckett, an architect, had delivered his report and his plans for the work, and Bob Nazarian had decided not to proceed with the contractor chosen as a result of that process. Mr. Holford was, that day, inspecting the Mall to review Mr. Clinckett’s plan but had not yet even agreed with Bob Nazarian on the basis for payment. He did not intend to charge him if they did not reach an agreement on his services.<sup>131</sup>

Mr. Elliott told Bob Nazarian that, before ELNOS could agree to any loan, he would have to provide a business plan, past financial statements, projected future financial statements to see the impact of the work on the cash flow of the business, and some type of assurance that the work was actually going to solve the problem.<sup>132</sup>

They discussed the potential of Bob Nazarian borrowing \$125,000 from ELNOS and another \$125,000 from the Community Futures Development Corporation, a federally funded organization with an economic development mandate similar to ELNOS and with which ELNOS frequently worked. Bob Nazarian then said that he could raise \$200,000 which, together with \$125,000 from each of ELNOS and the Community Futures Development Corporation, would provide \$450,000. Mr. Elliott then pointed out that that would not be enough to pay the projected cost of \$890,000. Bob Nazarian replied that \$450,000 was enough to get the contractors mobilized, on site, and starting to work. Once that happened, he would figure out at some point in the future how he would pay the balance. Mr. Elliott testified that, once he heard that, he stopped taking notes because such a scheme would never be accepted by ELNOS. After the meeting, he told Mr. van Duin that they had just been asked to participate in a fraud on a contractor by securing a service for which he had no ability to pay.<sup>133</sup>

Bob Nazarian admitted telling Mr. Elliott that a total of \$450,000 would be enough. He testified that his plan was to “go after the RBC” for the excess required. He was referring to a “reserve fund” established by the mortgagee to which Eastwood was required to make payments to be used, with the mortgagee’s permission, to make required capital expenditures. At one time, this fund reached \$300,000, and Bob Nazarian hoped to gain access to those funds to pay to fix the roof. He admitted that the mortgagee had to agree to allow him to use these funds. He said that, if they did not, “we had to take a lawsuit or something, because it’s our money.” That was his “plan” for financing the balance of the \$890,000 if he could borrow \$250,000 from ELNOS and the Community Futures Development Corporation. Even if he could access the \$300,000 reserve fund, he would have been short about \$200,000.<sup>134</sup>

**I conclude he had no plan. He was just looking to borrow money from whichever source he could find, to at least start work on the Mall’s roof so as to dissuade tenants from leaving. And, as I indicated earlier, he was not prepared to put his other considerable assets into the “black hole” of the Algo Mall.**

I conclude he had no plan. He was just looking to borrow money from whichever source he could find, to at least start work on the Mall’s roof so as to dissuade tenants from leaving. And, as I indicated earlier, he was not prepared to put his other considerable assets into the “black hole” of the Algo Mall.<sup>135</sup>

### **Bob Nazarian asks the City for financial support to fix the roof**

Mr. Elliott's notes taken during the meeting with Bob Nazarian and Mr. England state, "[W]ill be seeing Rick H. and Fred B. today @ 11:30 a.m."<sup>136</sup> Mr. Elliott testified that Mr. Nazarian told him he was going to see Mayor Hamilton and Mr. Bauthus to ask for financial support and, potentially, tax relief from the City.<sup>137</sup> Bob Nazarian testified that he did meet with them on that date because "we were desperate on getting fund or any way to fix the roof permanently," and he asked them "as the largest taxpayer in the town" for help, including (although he was unsure of the date on which he asked this) to "arrange a couple of years of taxes to be forgiven so that we can use the fund to remedy the roof repair."<sup>138</sup> Although Mr. Bauthus could not remember the specific date of such a meeting, he did recall meeting Bob Nazarian with Mayor Hamilton and Mr. England in the spring of 2008 to discuss fixing the roof. While he did recall Bob Nazarian saying that the repairs would cost over a million dollars, he "would have assumed that he was looking for money in that respect," but he could not "recall that he spoke specifically on the financing of the issue."<sup>139</sup>

I conclude that a meeting took place between Bob Nazarian, Mr. Bauthus, and Mayor Hamilton on May 30, 2008, at which Mr. Nazarian asked for the City's support in fixing the roof. It is probable that, at that meeting, Mr. Nazarian asked the City for financial support. It was not forthcoming.

### **Syl Allard retires without seeing that the Notice of Violation was enforced**

On May 30, 2008, Syl Allard retired as the chief building official and property standards officer of the City of Elliot Lake. Chris Clouthier replaced him in an acting capacity.<sup>140</sup>

Between October 24, 2006, when the Notice of Violation was issued, and May 30, 2008, Mr. Allard never received a copy of the engineering report he had demanded in the notice. Nor were the leaks fixed. When asked what he did to obtain compliance with the Notice of Violation, he testified, "I had every indication that it was on its way, that they were working on it." It was his evidence that he tried to gain compliance by co-operation, and Eastwood was attempting to address both the issues in the notice. He said: "I was of the impression that it was on its way, and every indication that they were co-operating in terms of providing that."<sup>141</sup> I do not accept this evidence. Mr. Allard received an email from Bruce Caughill in February 2007 stating that he would be receiving a report within six months (by the end of August 2007). That email was sent more than two months after the engineering report was required by the notice. When August 2007 came and went, Mr. Allard did nothing. He did nothing to verify that the roof repairs were ongoing. He did nothing when the newspaper story was published on April 30, 2008, stating that \$1 million of repairs were about to be undertaken and no building permit had been applied for.

Mr. Allard knew, by his own statement in the report he prepared of his inspection of October 19, 2006, that there was a potential for structural damage from the years of leaks.<sup>142</sup> He did nothing other than to issue his Notice of Violation of October 24, 2006. It was nothing more than an empty threat and was treated as such.

Mr. Clouthier had no involvement whatsoever with the Notice of Violation after it was issued – Mr. Allard was handling it.<sup>143</sup> That lack of involvement should have prompted Mr. Allard to take steps to ensure that either his interim successor, Mr. Clouthier, or his permanent successor were advised of the situation and its potential risks. Mr. Allard did not give Mr. Clouthier any briefing on any outstanding files or matters that were ongoing at the City before his departure.<sup>144</sup>

I can conceive of no justification for this inaction. Mr. Allard was aware of the risks created by the ongoing leaks. He had the ability to determine the extent of the risks, force the leaks to be repaired, or close the Mall. He chose to do nothing.

## Andrew Holford concludes that the roof deck's design will not support Mr. Clinckett's proposal

After Mr. Holford returned to Toronto on May 31, 2008, Bob Nazarian asked him whether he could improve, in both performance and cost, on the system proposed by Mr. Clinckett. This request was never formalized into a signed retainer with Kleinfeldt.<sup>145</sup> Mr. Holford was asked to consider erecting a permanent tent-like structure over the parking deck. He visited Sherway Gardens in Toronto where a similar structure was in place. He reviewed technical information and determined that it would cost about \$17 million. Bob Nazarian confirmed Mr. Holford's conclusion that this was obviously not an acceptable alternative.<sup>146</sup>

Mr. Holford reviewed Mr. Clinckett's proposal. He was concerned about Mr. Clinckett's reliance on a "diversity factor" to effectively conclude that the roof could support the added weight of a thick membrane and asphalt wearing course. He said that the concept appeared to him to be akin to what is called a "load reduction factor" – reducing the design load for a building on the basis that equal loads over the entire floor are unlikely.<sup>147</sup> Mr. Holford's reaction to Mr. Clinckett's proposal may be explained by the fact that Mr. Clinckett had not included in his written report the information that the calculations supporting his proposal were made on the basis that the snow and the cars would not both be on the roof deck at the same time – a point he made in his testimony before me.

Mr. Holford spoke to Bob Nazarian and told him he had doubts as to whether Mr. Clinckett's system would work.<sup>148</sup> Mr. Nazarian confirmed that he had asked Mr. Holford to determine whether the weight of the proposed system would be excessive.<sup>149</sup>

Mr. Holford did not inspect the condition of the supporting steel structure or the hollow core slabs themselves. He had not been told that the leaks were as widespread, intense, and long-lasting as they were. He was not asked to do such an inspection. His calculations were made to determine whether the building was designed to support the load of the proposed thick membrane and asphalt topping.<sup>150</sup>

Mr. Holford was asked whether he told Bob Nazarian anything about the effect of the water on the structure. It was his evidence that this was a "given." Although he did not tell Mr. Nazarian that the damage was so severe that he believed there was potential for imminent danger, he did tell him that the water was causing damage. When I asked him whether he had specifically told him that continued water ingress would damage the structure, he said that he had.<sup>151</sup> It is unfortunate that this information was never reduced to writing.

Mr. Holford contacted Coreslab in an effort to determine the load capacity. He received the original shop drawings and some design tables on June 11, 2008, and spoke to someone from Coreslab. Stephen Blaney, the president of Kleinfeldt, did some calculations as well. He determined that the system had been designed to carry 120 psf. He calculated that the additional load from the proposed thick membrane and asphalt topping would make the total load on the structure between 140 and 143 psf – too much for the building to support.<sup>152</sup> These calculations were not completed until July 16, 2008, long after the work on the roof started.

Eastwood had also asked Mr. Clinckett to confirm his opinion that the load would be supported. On June 10, 2008, Antoine-René Fabris, Eastwood's lawyer, wrote to Mr. Clinckett, stating:

I have had the opportunity of reviewing the documents in regards to fluid applied waterproofing and asphalt cover with respect to the upper deck of the Algo Centre Mall.

I have also had reviewed [sic] your correspondence dated March 13th, 2008.

Would you please provide a letter with respect to the ability of the roof to withstand the added weight of both the membrane and the additional asphalt?<sup>153</sup>



In the meantime, however, before Mr. Clinckett had answered that question and before Mr. Holford had given Bob Nazarian his opinion on that issue, Eastwood purported to enter into contracts which appeared intended to put Mr. Clinckett's design in place and made public statements that the work was underway.

## **June 2008: The leaks continue, and Eastwood's promised repairs are underway**

### **Zellers complains and is given false assurances that work is starting**

June 2008 was a particularly difficult time for leaks. Mr. Cuthbertson, Zellers' manager, testified that customers would often complain about the leaks, the number of buckets, and the fact that aisles were closed off. On June 5, 2008, a customer wrote to say: "It felt as though it were raining inside, buckets everywhere, could not access the sporting good section easily." Mr. Cuthbertson testified that Mall management had told him in the spring that they had hired a construction company to replace the silicone in all the joints and they would start work as soon as the weather was warm enough.<sup>154</sup>

On June 13, 2008, Mr. Cuthbertson received an email from Ms. Taylor advising him that she had just been told by Bob Nazarian that he was meeting the following Monday or Tuesday with the engineers, experts, and contractors to discuss the roof work, which he expected to begin that week. On June 16, she emailed him to say that Mr. England had told her that the contract had been signed and the crew was to begin work on June 18. On June 18, Mr. Cuthbertson responded, telling her that there were no contractors on the roof.<sup>155</sup>

### **Empire Roofing: A bogus company with a bogus contract to placate Zellers**

Eastwood's false statement to Zellers that a contract had been signed was facilitated by the creation of a corporation and a contract designed to give the false appearance that work was set to begin.

Andrew Sennett operated a company known as Bitflow Software. He testified that its business related to Internet protocol technology – anything to do with the Internet, such as networking, surveillance over the Internet, and telephony. He has no experience in the construction business, has never done any roofing or concrete work, and is not a structural engineer or architect. He was hired by Bob Nazarian in late 2007 to install a surveillance system in the Mall. The surveillance system was not completely installed until 2009. Throughout 2008 and 2009, he was in Elliot Lake every few months for a day or two, more frequently in the summer of 2008. He would usually travel from Toronto with Mr. Nazarian. From time to time, Mr. Nazarian would ask Mr. Sennett to attend meetings with him. He testified that he was usually introduced as Eastwood's security consultant.<sup>156</sup>

On June 16, 2008, Mr. Sennett incorporated a company called The Empire Roofing and Restorations Inc.<sup>157</sup> He testified that Bob Nazarian had asked him to do so, saying that he needed a "shell company to do construction and financing for him." Mr. Sennett testified that he did not ask Mr. Nazarian why he did not incorporate the company through his lawyer or do it himself. It was never Mr. Sennett's intention to run the company. He testified: "[I]t [Empire Roofing] will prepare whatever needed for his business needs for the construction and the finance. That's my understanding."; The company would be transferred to Mr. Nazarian "some time after."<sup>158</sup>

Bob Nazarian's evidence was different. He testified: "Since ... we are in hardship, as a good friend, he [Mr. Sennett] brought this gesture, that maybe he can help us by creating a new company and work very hard with Levon to try to get us the fund that we need." It was Bob Nazarian's evidence that Mr. Sennett suggested that the company be created because the mortgage administered by the Royal Bank was making it hard for Eastwood to borrow money, and that he "probably can get funds for us through another company."<sup>159</sup>

On June 16, the same day the company was incorporated, a contract was executed between Empire Roofing and Eastwood on a standard construction contract form.<sup>160</sup> It was signed by Bob Nazarian on behalf of Eastwood, and by Mr. Sennett on behalf of Empire Roofing. The work required by the contract was described as “Fluid Applied Waterproof Membrane and Asphalt Cover,” with Mr. Clinckett listed as the consultant. The contract was identical to the contract prepared by Mr. Clinckett to be entered into with C3 Harrell after the tender call, with three exceptions – the price was left blank, the name and address of the contractor was completed at clause 6.1, and both parties signed it.<sup>161</sup> Even the date of May 14, 2008, on the front page of the contract was the same, although the Empire Roofing contract was signed on June 16.

Mr. Sennett testified that Bob Nazarian walked into his office and said “he wanted me to sign this because he needed to obtain finance for the mall to fix the roof, so I signed it.” He said he did not ask him any other questions about the contract, and he signed it because he trusted that Bob Nazarian knew what he was doing. Empire Roofing never had any employees, and he himself did not have the ability to perform the work. Nor did he have any intention of performing the work. Mr. Sennett testified that Mr. Nazarian said his engineers would do whatever was required.<sup>162</sup>

Bob Nazarian testified that the contract was entirely prepared by Mr. Sennett and presented to him (Mr. Nazarian) at his son Levon’s office or Mr. Sennett’s office. He did not believe, however, that Empire Roofing was going to do the work that Mr. Clinckett was proposing for the roof. He testified that Eastwood would get a contractor to do the job under Mr. Sennett’s supervision. He had no idea who that contractor would contract with. He said he was “vague and uncomfortable with this situation.”<sup>163</sup>

Hudson’s Bay was advised on June 16, 2008, that “the contract has been signed and the crew is to begin this Wednesday.”<sup>164</sup> That same day Empire Roofing was incorporated and the false contract signed.<sup>165</sup> At some point, the contract was sent to Hudson’s Bay, because the Commission obtained it from that company alone.

It is clear to me that both Bob Nazarian and Mr. Sennett knew that Empire Roofing would never be a legitimate company. It was formed as a result of an agreement between them to use the company as a ruse to make it appear that Eastwood had entered into a contract to fix the roof, though it had done no such thing. The first time this company was used was to convince the Hudson’s Bay Company, the owner of Zellers, that Eastwood was about to fix the roof – when that was patently false. As will be seen, it was also used later in an attempt to obtain funding.

### **Bob Nazarian makes a false public announcement that repair work is underway**

The June 2008 edition of the *Northern Business Journal* ran a story with the headline, “City’s mall focuses on community, customers.” It featured a photograph of Bob Nazarian, Mr. England, and Mr. Sennett with the caption indicating that these men “are busy making improvements to the Algo Centre Mall.” The article stated:

The mall’s roof has had a leaking problem since the 1980s but Eastwood is addressing that problem and spending close to \$1 million to repair it.

The plan is to place a rubberized membrane on the 120,000 square-foot roof parking area, put a protective covering on top of it and then apply a three-inch layer of asphalt.

“Tenants and customers don’t want to see that,” said Sennett. “Ceiling tiles have been changed but there is going to be a permanent solution.”<sup>166</sup>

Bob Nazarian denied giving the journalist this information but acknowledged being interviewed for the article. He admitted that, at the time this article was published, he was still seeking funding for the work and was seeking a second opinion about the weight issue. Nevertheless, he testified that they had the “approximate” funds “to start to almost finish by injecting money from the line of credit of my house, getting the fund from the Royal Bank, and getting some kind of income from the Mall.”<sup>167</sup> But he had not signed a real contract to fix the roof with anyone at the time this article was published. As he had done so many times before, he was making promises that he was not in a position to keep.

## Peak Restoration is hired to do half a job

### Bob Nazarian looks for a cheaper contract – and gets one

Glen Day is a contractor who, he claims, has worked in the construction business for about 35 years and has done restoration work, including waterproofing. He owns his business, Peak Restoration. He testified that he had experience in restoring parking garages and applying membranes. He is a member of Serpent River First Nation, which is located near Elliot Lake, although he has lived and worked in Ottawa and Toronto.<sup>168</sup>

Isadore Day, the chief of the Serpent River First Nation, is Glen Day’s cousin. Glen Day testified that Chief Day had told him that Bob Nazarian would be doing some work on the roof of the Mall.<sup>169</sup> Bob Nazarian confirmed this point.<sup>170</sup> Glen Day, Isadore Day, Bob Nazarian, Mr. England, and Mr. Fabris, Eastwood’s lawyer, had dinner in around the second week of June 2008.<sup>171</sup> They discussed the roof leak issues, and after dinner they walked around the Mall. Glen Day testified that Bob Nazarian showed him different areas where the roof was leaking. He saw pails on the floor and stained ceiling tiles.<sup>172</sup>

On June 18, 2008, after the dinner had taken place, Mr. Clinckett faxed Glen Day the specifications he had prepared for the tender process.<sup>173</sup> Mr. Day testified that he was sent these documents so he could price the work.<sup>174</sup> By this time, Mr. Nazarian had received and rejected prices from both C3 Harrell and Conterra on the basis that they were too expensive – C3 Harrell not being willing to pay for the materials itself. Two days earlier, he had signed the false contract with Empire Roofing.

The specifications sent to Mr. Day provided for the installation of a membrane manufactured by Carlisle Coatings and Waterproofing Inc., an American company. That product is applied as a hot liquid. It needed to be covered with a thin sheet of protection board, and then an asphalt driving or wearing surface.<sup>175</sup>

On Sunday, June 22, Mr. Day sent to Bob Nazarian, Mr. England, and Mr. Clinckett a proposed contract. He quoted a price of \$619,369, of which \$214,950 was for the asphalt topping. He also quoted prices for caulking, installation of new drains, and temporary patching (“expose problem areas by removing existing failed materials and temporarily replace with short-term membrane”) at prices which were dependent on the amount of work required.<sup>176</sup> The total price, excluding these extras, was almost \$300,000 less than the price Mr. Nazarian had agreed to pay C3 Harrell before he resiled from that contract, and \$400,000 less than what he had told the community he was going to pay in his statements to the *Elliot Lake Standard* and the *Northern Business Journal*.

Mr. Day’s proposed contract also contained the following clause:

Upon the commencement of work, mobilization will be invoiced at \$100,000, plus GST. Invoices to be broken out as follows: \$50,000 plus GST as per June 26, 2008 and \$50,000 plus GST as per July 3, 2008 – both to be paid upon receipt.<sup>177</sup>



## Peak Restoration starts work without a signed contract

Mr. Fabris testified that on June 22, 2008, Mr. Nazarian telephoned and, over the course of a three-hour conversation, told him that he had decided to give the contract to Mr. Day. Mr. Fabris attempted to convince Mr. Nazarian to wait until Mr. Day's references had been checked. It was his evidence that, at the end of the call, he had persuaded Mr. Nazarian to wait for the references before any decision was made.<sup>178</sup>

Nevertheless, Mr. Day and his men began work on June 23 or 24. Mr. Fabris testified that the work started June 23.<sup>179</sup> Robert Cousineau, Mr. Day's general manager, made a note on June 24 which stated that they had removed approximately 200 feet of expansion joint and caulking, removed a concrete patch 18 inches in width and 10 feet in length, recovered the affected area with concrete and resealed it. A second note the next day, June 25, advised that they were working on the expansion joint at the elevator entrance, and the more they removed the more work was required.<sup>180</sup>

The work was proceeding without a signed contract. Mr. Day testified that, after they had started to work on the roof but before the contract was signed, he was shown a number of reports by Mr. England, including the Trow report of November 6, 1995.<sup>181</sup> That report, which was in a letter to Rod Caughill, the development supervisor at Algoma Central Properties Inc., the Mall's owner at the time, was in response to specific questions he had put to Trow. Trow advised that a waterproofing system which weighed up to 20 psf could be installed over the existing concrete topping.<sup>182</sup>

Mr. Day testified that he discussed this report with Bob Nazarian and Brian England. He said that he wanted to be sure that the installation, including the 3-inch asphalt topping required by Carlisle for it to provide a warranty, could be installed. He also testified that he spoke to the asphalt supplier and determined, on the basis of the Trow report, that the weight of the wearing course would be too much for the roof to support.<sup>183</sup>

Bob Nazarian denied ever seeing the report or ever talking to Mr. Day about the issue of the maximum weight the roof could support.<sup>184</sup> He agreed, however, that he was concerned about the weight. He had asked Mr. Holford for his opinion on the issue and had Mr. Fabris ask Mr. Clinckett. Neither had replied by the time Mr. Day started to work on the roof. It was his evidence, however, that he did not know that Mr. Day's forces were at work. He testified that he and his son Levon decided not to sign the contract Mr. Day had sent on June 22 because they were attempting to determine whether the 3-inch asphalt topping could be applied. As he explained, "[W]e put Mr. Day on hold until we get a response from Kleinfeldt." He did not, however, tell Mr. Day not to start work.<sup>185</sup>

As I have indicated, Mr. Day's forces started to work no later than June 24, 2008. Mr. Fabris noticed their presence and wrote to Bob Nazarian that day:

Please be advised that I have yet to receive an opinion letter from Mr. Clinckett with respect to the additional weight load on the roof of the mall.

Further, perhaps you could advise me as to why contractors are currently working at the site. It is my understanding that the contract is yet to be executed and/or awarded.<sup>186</sup>

Bob Nazarian testified that, when he received that letter, he was shocked. He telephoned Mr. Fabris and asked why Mr. Day's forces had started to work when the contract was not yet executed. He did not give him any instructions, but then called Mr. England and asked how he permitted the work to start without knowing whether they had a contract. He testified that Mr. England responded that he was under the impression that Mr. Nazarian had given permission for the work to start.<sup>187</sup>

Mr. Fabris's evidence was different. He testified that he called Bob Nazarian, not the other way around. He also testified that, when he expressed his concern to Mr. Nazarian that he had thought no work would start until Mr. Day's references were checked, Mr. Nazarian said that Mr. England had received references and that he needed to get the work started or he was going to lose tenants.<sup>188</sup>

For the reasons I set out below, I accept Mr. Fabris's evidence on this point.

### **The City notices the ongoing work and issues an order against it**

Mr. Fabris was not the only person to notice the work on the roof. On June 25, 2008, Mr. Clouthier, the acting chief building official, received a telephone call stating that work was being done on top of the roof deck at the Mall. He went over to investigate and found a crew of six to eight men, with compressors, hoses, and jackhammers, about to start working on the roof. He spoke to Mr. England and told him he was not to carry out any work without first getting a building permit. Mr. England argued that a patch repair on a parking lot did not need a building permit, but Mr. Clouthier went ahead and issued an order to comply under section 12(2) of the *Building Code Act*. It required Eastwood either to obtain a building permit for the construction or to restore the area to its original state. The order to comply was delivered to Mr. England and faxed to Bob Nazarian.<sup>189</sup>

On June 30, 2008, Mr. England provided the City's Building Department with an application for a building permit. The information provided was quite sparse. The work was described as "waterproofing of top parking deck," and the project value was estimated at \$700,000.<sup>190</sup>

### **Eastwood signs a contract with Peak Restoration but deletes the asphalt covering needed to make the repair work**

On June 27, 2008, Mr. Day signed a contract with Eastwood Mall for the repair work on the roof deck.<sup>191</sup> The contract was the one he had sent on June 22, but with the asphalt topping crossed out and the words "not included" written beside that clause. The deletion reduced the total price by \$214,950. It also meant that, when Mr. Day finished his work, the roof would not be waterproofed: the asphalt wear course was essential to the project. It was also required for the manufacturer's warranty to apply.

Bob Nazarian did not sign the contract on behalf of Eastwood. Mr. England signed, but over a signature line that read "Brian England Eastwood Mall Inc." with the word "witness" in a handwritten addition. The contract had a line for Mr. Nazarian's signature on behalf of Eastwood Mall Inc., but it was left blank.

On June 30, 2013, Mr. Fabris wrote to Mr. England, with a copy sent to Bob Nazarian, saying:

I have reviewed the quote from Building Restoration and General Contracting, and confirm you attended our office on June 27, 2008 along with Mr. Day to execute the contract.

I would like to note that while I do not profess to have any specific knowledge with respect to roof renovations, it appears as though the contract does follow the standard construction document provided by Mr. Clinckett, the architect.

I confirm we excluded from the contract the asphalt topping component as I understand that you are reviewing a contract with K.J. Beamish to undertake this.

I have not been able to check any references for Mr. Day, but I understand that you have done so and confirmed that he is a reputable contractor who has a history of performing this type of work.<sup>192</sup>

Bob Nazarian testified that the first time he knew the contract had been signed was when he received this letter on June 30. He said that he had an "uncomfortable feeling that how could it be that we are cancelling the asphalt on top and yet we are signing a contract to go ahead and do the job?"<sup>193</sup> He testified that the only thing that

Mr. Fabris said to him about whether Mr. Day should be hired before the contract was signed was that it seemed to him that Mr. Day's company was legitimate.<sup>194</sup> When pressed, however, he said that it was "possible" that Mr. Fabris spoke to him for three hours on the Sunday before the contract was signed and told him that it was a bad idea to sign it.<sup>195</sup> He was adamant, however, that

Mr. Day's contract was simply unprecedented because we did not sign his contract and we talked about it and we were inquiring about the possibility of that kind of repair, it would be suitable for our roof or not and yet, next, we know the job has been started.<sup>196</sup>

Mr. Fabris's evidence on this point was, again, different from his client's. He testified that he had spoken to Bob Nazarian about his concerns regarding the ability of the roof to support the asphalt coating and about the lack of references for Mr. Day. He stated that Mr. Nazarian told him that Mr. Clinckett had satisfied him that the roof would support the extra weight; that Mr. England had told him (Mr. Fabris) that he had checked the references of Mr. Day and was satisfied, but that he had told Mr. Nazarian he did not believe him; and that Mr. Nazarian told him that Mr. England could sign the contract.<sup>197</sup>

Mr. Fabris's evidence is partially corroborated by that of Mr. England, who testified that Bob Nazarian asked him to go to Mr. Fabris's office to sign the contract, but only as a witness.<sup>198</sup> Mr. Fabris's evidence is also partially corroborated by a letter he wrote to Mr. Nazarian on July 2, 2008:

Further to our conversation of June 26th, 2008, I confirm that I have reviewed the weight calculations from Mr. Clinckett; I also confirm that you are satisfied as to the ability of the Mall to support the added weight of both the asphalt and the membrane.

I have spoken to Brian [England], he has advised me that he checked the references of Mr. Day, however they were not provided to me prior to the contract being commenced.

I have reviewed the terms of the contract, which in the whole is legal and binding, and seems to fulfil the requirements of the leaky roof.<sup>199</sup>

Bob Nazarian testified that "[d]efinitely I was not sure" about the ability of the roof to support the extra weight and that Mr. Fabris was not wrong but "confused" when he wrote that he was satisfied on that point.<sup>200</sup> There is no evidence, however, that Mr. Nazarian wrote back to Mr. Fabris to deny the lawyer's assertion that he was satisfied or to tell him that the contract was not binding because Mr. England was not authorized to sign it.

Instead of doing either of those things, in accordance with the unsigned contract Bob Nazarian paid Mr. Day for the work his forces had started. On June 25, Peak Restoration issued an invoice in the amount of \$50,000, plus \$2,500 GST, for the initial mobilization payment.<sup>201</sup> Eastwood paid that invoice on Mr. Nazarian's instructions sometime around the end of June or beginning of July.<sup>202</sup>

Mr. Nazarian testified that he made that payment, despite not authorizing the work. I do not accept that evidence. At this point in my review of the evidence, I would not be making an overstatement to assert that Bob Nazarian does not spend money unless he is obliged to do so. This payment was made after the contract was signed on June 27, 2008. This establishes, in my view, that the contract was executed by Mr. England on that date in accordance with the authority he had been given by Mr. Nazarian to do so. Mr. Nazarian had decided, at least by June 27, that Mr. Day would carry out at least the surface preparation and membrane application portion of the roof repair.

Mr. Nazarian went ahead with this work even though he did not know at that time whether the roof would be able to support the asphalt overlay that was required to ensure that the membrane would protect against further leaks. Mr. Fabris's letter of June 10 to Mr. Clinckett, asking him to review his opinion on that issue, had not yet been answered. Nor had Mr. Holford of Kleinfeldt provided his opinion. I conclude that Bob Nazarian had decided



that the situation with his tenants and their complaints about the leaks were so significant to the ongoing economic viability of the Algo Mall that he had to be seen to be doing something. Consequently, he proceeded with the cheapest alternative he had. He hired Mr. Day's crew to do half the job, without knowing whether the job could be finished.

One may ask why Mr. England signed the contract merely as a "witness." I accept his evidence that he did so on Bob Nazarian's instructions. The effect was that it gave Mr. Nazarian some basis to argue, should Mr. Day seek to enforce the contract, that it was not binding because it had not been signed on behalf of Eastwood. Given Mr. Nazarian's ongoing refusal to commit his company to significant expenditures, it is hard not to draw the conclusion that this was what he intended. As the evidence showed, Mr. Nazarian had a pattern of leaving the impression that he had committed himself without having clearly done so. Furthermore, this behaviour was consistent with Mr. Nazarian's own admission: "I do not like to leave a paper trace."<sup>203</sup>

### **Eastwood does not pay Peak Restoration what the contract says is due and manipulates payments to facilitate a false grant application**

Mr. Nazarian did not, however, pay Mr. Day's company all that it was entitled to under the contract. As noted above, the contract called for two mobilization payments of \$50,000 plus GST – one on June 26 and one on July 3. The first was paid. An invoice for the second was issued by Mr. Day on June 25 – 10 days early – but was not paid in full. Both invoices were issued to Eastwood Mall Inc., the company that owned the Mall and had entered into the contract with Peak Restoration.<sup>204</sup>

Mr. Day testified that, after the first invoice had been paid, Bob Nazarian told him that he wanted to pay the invoices through another company. He also said that he would pay him only another \$30,000, rather than the \$100,000 called for by the contract, and he wanted the entire \$80,000 to have been paid by the other company. Mr. Day issued a new invoice in the amount of \$80,000 plus \$4,000 GST directed to Empire Roofing.<sup>205</sup> Mr. Day and Mr. Nazarian met at the bank used by Empire Roofing in Richmond Hill. Mr. Nazarian gave Mr. Day a cheque for \$80,000 drawn on Empire Roofing's account, and Mr. Day gave Mr. Nazarian a cheque for \$52,500.<sup>206</sup>

Mr. Nazarian confirmed that this exchange took place and testified that it was done this way at the request of Mr. Sennett, who had told him that, to make Empire Roofing "legitimate," some transaction should be shown in the company.<sup>207</sup> Mr. Sennett denied knowing anything about this invoice, testifying that the first time he saw it was when he was provided with documents by the Commission before giving his evidence.<sup>208</sup>

Bank records show that the Empire Roofing account was opened on June 27, 2008 (the day the contract with Peak Restoration was signed), and Bob Nazarian could make withdrawals without a co-signer.\* An \$84,000 cheque from Eastwood endorsed by Bob Nazarian<sup>209</sup> was deposited into the Empire Roofing account on July 3, 2008.<sup>210</sup> A bank transfer of funds to Peak Restoration of \$80,000 was made on the same day.<sup>211</sup>

When asked why it was necessary to go through this process, which made it appear that Peak Restoration was being paid by Empire Roofing rather than Eastwood (the actual payor), Bob Nazarian testified:

Completely legitimate. We were giving a chance to our friend to find a grant for us. We have purchased a booklet. We paid, I think, close to \$450, if I'm not mistaking, to show what kind of government grant there is for a company that's in need of extra fund.

We were struggling to survive. We were not making too much money. We were almost losing money. Our line of credit in our house was gone down and we were knocking every door possible for help.

• • • • •

\* Exhibit 6202. In addition, signing authority was held by any two of Bob Nazarian, Irene Nazarian, or Alex Sennett.

We couldn't get help from the City of Elliot Lake to reduce the taxation. We couldn't get help from the existing mortgage which was tying our hands from the back.

... As we have seen, we didn't get any kind of proper response, even though I was not involved, from ELNOS. And this gentleman, Mr. Sennett which was very dear friend, he was trying to help us get a grant. And we have followed his order in order to be able to survive. And there's no hanky-panky or ... any other reason beside this.<sup>212</sup>

I do not accept this evidence. Hanky panky redux! As I have indicated, Bob Nazarian had the ability to pay for the needed repairs. It is clear to me that the establishment of Empire Roofing, and the manipulations with the payments to Peak Restoration, were part of a scheme to present the false picture that Empire Roofing was a legitimate company engaged in the repairs to the roof. Mr. Nazarian followed this process because, as he testified, he hoped to become the beneficiary of a grant intended to facilitate those needed repairs.

Bob Nazarian testified that the payment made to Peak Restoration was \$80,000, rather than the \$100,000 required by the contract, simply because "I have decided to reduce it to \$80,000."<sup>213</sup> Mr. Day testified that, although that was not the agreement, he agreed to have his forces continue working with the reduced payment.<sup>214</sup>

### **The membrane is not ordered**

Mr. Day was not, however, prepared to pay for the cost of the materials needed to install the Carlisle membrane system. He testified that they cost about \$160,000, and he wanted to have Eastwood pay for them because he had heard that other suppliers were having trouble getting their bills paid.<sup>215</sup> On July 7, 2008, Bob Nazarian refused to do so, taking the position that Mr. Day's company had to start the job before he would pay any more.<sup>216</sup> As a result, the materials, essential to the fix that Mr. Day was supposed to be putting in place, were not ordered.<sup>217</sup>

### **The City's new chief building official learns of the work being done without a building permit and does nothing to stop it**

Bruce Ewald became the chief building official at the City of Elliot Lake on July 7, 2008, and held that position at the time the Commission heard evidence. He had worked in construction, starting as a labourer in 1981 and becoming a site supervisor in 1987. In 2000, he spent a year taking courses to be certified under the Ontario *Building Code* as a building inspector. He started work in that position in the Township of Springwater, Ontario, and by 2008 he was that municipality's deputy chief building official. Springwater has a population of approximately 12,000 residents, about the same size as Elliot Lake. It is predominantly rural<sup>218</sup> and did not have a property standards by-law.\*

Mr. Ewald testified that when he began work at the City, he familiarized himself with the by-laws, policies, and procedures. He learned that the City had a Property Standards By-law requiring that buildings be watertight – that they did not leak – and maintained in a structurally sound condition.<sup>219</sup> Although the Building Department kept a file on each building it had dealt with, he did not read through the file on the Mall until September 2009.<sup>220</sup> At that time, he saw and skimmed through the 1999 Halsall report. The inspection report prepared by Mr. Allard in October 2006, which led to the Notice of Violation of October 24, 2006, was not in the file. He did not learn, at the time he started, about the Notice of Violation.<sup>221</sup>

.....

\* Ewald testimony, May 24, 2013, p. 11432. Municipalities in Ontario have the jurisdiction to enact property standards by-laws, but are not required to do so: *Building Code Act*, 1992, SO 1992, c 23, s 15.1.

Mr. Ewald did not meet with Mr. Allard, who had been retired for about six weeks when he started, to familiarize himself with the ongoing issues pertinent to his new job. He did have conversations with the two inspectors already there, Mr. Clouthier and Mr. Swan.<sup>222</sup> Mr. Clouthier told Mr. Ewald on the day he started work that, while he was acting chief building official, he had issued the order to comply requiring that a building permit be obtained for Mr. Day's repair work on the roof. Mr. Ewald assumed, if he was not told, that the work was being done to repair leaks. He reviewed the application form that had been submitted for the building permit and concluded that it was inadequate.<sup>223</sup> He then emailed Mr. Bauthus (with a copy to Mayor Hamilton) the same day, writing:

Further to our conversation about the new roof/parking area over the mall and the requirement for a building permit, 8-(1) B.C.A. states "No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefore by the chief building official." The word "construct" means to do anything in the erection, installation, extension or *material alteration or repair of a building* and includes the installation of a building unit fabricated or moved from elsewhere.

Brian England dropped off an application form but the material submitted is not sufficient to issue a permit. I am attempting to contact Brian regarding this matter and hopefully we will see a resolution to this situation in the near future.<sup>224</sup> [Emphasis in the original.]

Mr. Ewald then, within the next few days, met with Bob Nazarian, an engineer whose name he could not recall, a representative of a waterproofing company (likely Carlisle), and a few other people on the roof of the Mall. He heard they were meeting and testified that he went over right away because he wanted to make sure they understood that a permit was required for any major work on the roof. The person he understood to be an engineer told him that a permit was not required to repair a parking lot, and Mr. Ewald responded that the parking lot was the roof of a building and that a permit was definitely required.<sup>225</sup>

On July 23, 2008, Mr. Ewald wrote to Bob Nazarian, stating that he had informed Mr. Cousineau (who had formerly been Mr. Day's senior staff person and now was project supervisor for the repair work) of the requirement for a building permit. He noted that, given the size of the building, the *Building Code Act* required that an architect and a professional engineer undertake the design and general review of the work.<sup>226</sup> It was his evidence that this requirement is to ensure the structural stability of the building and to prevent any life safety issues.<sup>227</sup>

Mr. Ewald subsequently directed that the application for a building permit filed with the City on June 30 be marked "cancelled." He had learned, at some point, that Eastwood was not going to proceed with the repair work. The application was inadequate because the required review by an engineer and an architect was not included.<sup>228</sup>

Mr. Ewald knew that the owner was proposing to spend \$700,000 on the deck waterproofing repair work, because that was the amount set out on the building permit application. Nevertheless, he testified that he did not make any inquiries as to why the owner thought he needed to do that or how bad the leaks were. Nor did he make any inquiries at city hall or anywhere in the community with respect to the leaks and their history. When asked why he did not do so, he said he had learned they were cancelling the proposed repairs because of the cost and going back to a maintenance program of caulking all the joints. He made no inquiries to determine whether the maintenance program had worked in the past.<sup>229</sup>

Other than the meeting on the roof of the Mall, the letter of July 23, 2008, and three unanswered phone calls to Mr. England, Mr. Clinckett, and Mr. Cousineau, Mr. Ewald had no further contact with Eastwood Mall in 2008 about the roof and its repairs or proposed repairs.<sup>230</sup> As I discuss below, Mr. Ewald was later involved with the proposed purchase of City land for additional parking.



Mr. Ewald was not alone at the City in ignoring the ongoing situation at the Mall and the work that was proceeding without a building permit. On July 16, 2008 (the day after a very significant leak at the Mall), Ms. Morin emailed Ms. Croxson:

I was informed by Fred Bauthus at this morning's SMT meeting that the building permit has not yet been issued to the mall. Fred said that Brian England is well aware of what is required before a building permit can be issued and they are still working on getting all the documentation to the building department. As Chris Clouthier had mentioned in his email, no building permit will be issued until they comply.

Before going to the SMT meeting I was picking up a coffee at the foodcourt. They were drilling just above the foodcourt and we could barely hear ourselves ...

Also, when I returned from the SMT meeting Mr. Nazarian was talking with Brian and he asked to speak with me privately. He and I met in my office and he asked when the library would be signing the lease. I explained to him that we were not prepared to sign a lease until we are assured that it will no longer leak. Anyhow, he also mentioned that they are now looking into installing a roof on the top instead of the asphalt.

So I don't believe they will be applying for a building permit anytime soon since they still don't know what they're doing.<sup>231</sup>

Had Mr. Ewald made any reasonable inquiries, either on his own or at the behest of Mr. Bauthus, he would have learned of the significant work being undertaken by Mr. Day's forces and, as I will describe, the serious damage caused by it. Since Mr. Clouthier had already issued an order to comply requiring that a building permit be obtained, he could have, either on his commencing work at the City on July 7, 2008, or at any time after that, ordered that all work cease until the appropriate information was provided and a permit issued.<sup>232</sup>

This apathy and torpor is, to say the least, difficult to fathom. Once again, the City lost an opportunity to ensure that the work undertaken would, at a minimum, be supported by professional advice from an architect and an engineer. It also lost an opportunity to stop work that increased the leaks and, in all probability, the rate of deterioration of the structure.

### Peak Restoration's work causes more problems

Mr. Day testified that he had been asked by Bob Nazarian to start his work by installing 28 bi-level drains, which would drain water both from the top and below the surface, and to provide for a "swale" (a depressed area around a drain intended to provide more positive drainage) as big as 8 by 8 feet, or 8 by 4 feet, around each of them. This work required that the concrete be removed right down to the hollow core slabs in this area and involved jackhammers, saws, and grinders (see figure 1.9.3).<sup>233</sup>

After each area was dug out, it had to be protected because the workers were not ready to install the drains. Mr. Day's crew put Styrofoam in the void created by the removal of the concrete above the hollow core slabs, followed by a vinyl product called



**Figure 1.9.3** The effect of the work conducted on the parking deck by Peak Restoration, July 2008

Source Exhibit 4308

BlueSkin over the top, to try to prevent water from getting in. BlueSkin is a light “peel and stick” waterproof rubberized membrane commonly used on the exterior of foundation walls. It is sold in rolls. As Mr. Day testified, it rained every day his crew was working, so they always had an issue with leaks.<sup>234</sup>

Mr. Day confirmed his instructions in a letter to Mr. England and Mr. Clinckett, dated July 9, 2008:

Gentlemen, as was previously directed by Mr. Nazarian, Peak created a cavity which was intended to be part of the preparation work for the creation of a swale to eventually direct water to the existing drains. As per my conversation with Brian England yesterday, July 08, 2008, I was advised to temporarily fill the cavity with 2” Styrofoam, and then apply a BlueSkin membrane to stop further leaking while construction and repairs remain ongoing.<sup>235</sup>

This instruction was confirmed in a “change order” signed by Mr. Day and by Mr. England on behalf of Eastwood on July 10, 2008. Mr. England’s signature is followed by his handwritten note, “as per Bob Nazarian’s instructions.”<sup>236</sup> Mr. Nazarian denied giving this instruction, saying that to put BlueSkin on to stop leaks was “ridiculous.” He said he had never wanted the workers to use jackhammers.<sup>237</sup>

The work, whether authorized or not, caused many more leaks. Mr. Cuthbertson testified that the first heavy rain after the work started caused leaks wherever the BlueSkin was applied. He had to close down the Zellers store for almost two days, and they had full “trains of buckets catching water down aisles and through departments.”<sup>238</sup> He prepared a chart which showed that, between June 28 and July 17, almost \$6,000 in merchandise was lost and over \$2,000 in salary costs were expended in clean up.<sup>239</sup> A customer slipped on the water on the floor of the store. One-third of the ceiling tiles were removed in July 2008.<sup>240</sup>

Ms. Laroue gave the following evidence about events of July 15, 2008:

A. ... Mr. Nazarian phoned on July 15th, 2008. Brian was out dealing with customers and tenants in the mall. We had leaking like crazy. And Mr. Nazarian phoned very calm and he said to me, So isn’t it great? I said, What is that? He said, that the leaks are under control now, Peak is doing a good job.

Pardon? I said, Like you are kidding, right? And he said, No. And I said, I don’t even have time to talk to you because I have to go and help dump buckets. And he said, No, office staff doesn’t do that. And I said, Office staff? I said, We pulled everybody, every person from the hotel, every live body we had had to go and help Zellers.

And he said, No, Brian told me it is fixed. I said, Well, I don’t care what Brian told you; it is not fixed. And I hung up the phone.

I went up to Zellers. When I came down the hallway, I took the escalators up, and when I went down the hallway from sort of the library towards Zellers, the entranceway there, which would have been the expansion joint up above was leaking so badly that if all the buckets were there, there had to be 20 buckets spread out right there in the doorway. We put –

Q. That is the doorway to Zellers?

A. Yeah ... and this wasn’t the only place leaking, but we had purchased every bucket in Dollarama. We had every bucket in Zellers being utilized. We had our big garbage bins that were on wheels being utilized, and it turned out that that was not a good idea because we had no way to dump them, they became so heavy and so quickly, not realizing that at the time we put them out.

But when I got there and I had staff that I knew very well on the other side of the buckets, I couldn’t see them from the stream of water that was coming down. It was like a solid stream. It was raining worse inside than outside.<sup>241</sup>

Bob Nazarian travelled to Elliot Lake. He testified that he met with Mr. Fabris on the roof of the Mall. They saw the BlueSkin laid down but nothing to indicate any significant damage.<sup>242</sup>

## **After Bob Nazarian is told that the roof will not support the system Peak Restoration is preparing to install, he explores other options**

By the time Bob Nazarian arrived in Elliot Lake, he had been told that his fears were true – the roof would not support the waterproofing system designed by Mr. Clinckett. Mr. Fabris had not received a reply to his letter of June 10 to Mr. Clinckett asking for his opinion on this issue. He wrote again on July 10, asking Mr. Clinckett to provide in writing, within three days, confirmation that the structure could support the added weight.<sup>243</sup> On July 11, Mr. Clinckett replied, writing:

As you must know, as a practicing lawyer, there are Acts in Ontario that define the scope of services of both Architects and Engineers [available from the Ontario government/law website.] Structural practice is that of an Engineer, not an Architect.

We assumed from the drawings and the existing deck plan delivered by Mr. England one would be able to decipher the loading capacity of the roof, from the loading summary [about four letter sheets] prepared by a registered Professional Engineer in the province of Ontario and the shop drawings outlining the grid lines.

Should you need the load capacities noted on the plan we could have my staff prepare them for you, that is how I personally did it for my office reference set.

We refer to your comment in paragraph six "... we have some different opinions as to whether or not the structure can maintain the additional weight." We were unaware you were an engineer as well, but as so it should be not an issue for you to provide this letter. [Square brackets in the original.]<sup>244</sup>

Mr. Clinckett testified that the professional engineer he had relied on in concluding that the roof would support a thick membrane and asphalt overlay was Ed Karaluk of Coreslab. He had told him that the roof would support 120 psf. Mr. Clinckett had assumed that, when calculating the load that would be supported by the structure when the membrane and asphalt were applied, he could ignore the 30 psf of the concrete topping because it was normal to consider only the live load – and the concrete was a dead load. That assumption and the application of his diversity factor led him to conclude that the roof had sufficient capacity. That was the message he intended to convey by this cryptic letter.<sup>245</sup>

At 10:21 a.m. on July 16, 2008, Mr. Holford sent Bob Nazarian an email:

I have been reviewing the OBC [Ontario *Building Code*] requirements for loading on the roof slab of the Algo Mall in Elliot Lake in conjunction with the original Coreslab shop drawings and design tables. I have been working on this with Ed Karaluk of Coreslab Structures. After our review and discussions both Coreslab and Kleinfeldt are of the opinion that the existi[ng] structure is not capable of carrying the additional loading of the proposed waterproofing membrane and asphalt overlay.

If required we can look into alternative solutions however, based on my experience they will either be more costly or less effective, and possibly both.

Let me know how you would like us to proceed and we will begin working on developing alternative strategies.<sup>246</sup>

By this time, Mr. Nazarian was also looking at options other than the membrane. He had contacted another engineer, Dan Gagné of Trow in Sudbury. Mr. Nazarian testified that he had consulted him about the possibility of putting another roof on top of the Mall. On July 16 at 12:10 p.m. Mr. Gagné emailed Mr. Nazarian, writing:

As discussed on the phone, please forward all relevant as-built information you may have with respect to the mall construction including drawings, specifications, design data, geotechnical reports, etc.

I will review the package, I will speak to John your architect, and then I will schedule a site visit.



It is my understanding that the existing roof over the mall is used as a parking deck. The deck is presently leaking at several areas and it is your preference to install a roof over the parking deck as opposed to restoring the existing deck with a new membrane.

We will review the existing structural columns and footings and we will require information on the existing foundation soils all in order to determine if the installation of an additional roof is feasible.<sup>247</sup>

Mr. Nazarian testified that he had decided to speak to Mr. Gagné, to work in co-operation with Mr. Clinckett, to see whether they could “work some conclusion, even though the job was started.” As for Mr. Holford, Mr. Nazarian testified that he was “out of the picture because his quotation was \$17 million [referring to the cost of the tent-like structure used at Sherway Gardens as determined by Mr. Holford early in his retainer], but his suggestion was very useful by saying that the weight is not acceptable.”<sup>248</sup> In fact, as will be seen, Mr. Holford remained “in the picture” for a bit longer at this stage.

### **Mr. Holford tells Mr. Nazarian that the leaks will damage the structure**

Mr. Holford testified that he did not conclude, based on his observations on his one trip to the Mall on May 26, that there was imminent danger of collapse. It was his evidence, however, that he did tell Bob Nazarian that water ingress would damage the structure.<sup>249</sup> When asked if Mr. Holford had told him that, if water continued to enter the building, it would damage the structure, Mr. Nazarian responded that he did not recall that warning and that he was always under the impression that the Mall was structurally sound. When asked why he believed that to be so, he testified: “[I]t was a solid concrete and steel built [*sic*] with covering steel clad. There was no reason to think otherwise. We were not told or we did not have a previous report.” Of course, he did have access to, and had been told about, the Halsall report, but he claimed not to have read it. Nor, he testified, did he think about the fact that water on steel causes rust.<sup>250</sup>

Mr. Holford may have provided this advice to Bob Nazarian. As an examination of the transcript and particularly of Mr. Holford’s answers on the subject will show, Mr. Holford’s evidence was rather weak. In any event, however, Mr. Nazarian knew that the Mall was supported by a steel structure, and he knew that water on steel causes rust. I have no doubt that he must have known that, if the leaks were not stopped, there was a potential for structural damage. That was why the City had required a structural engineer’s report in 2006.

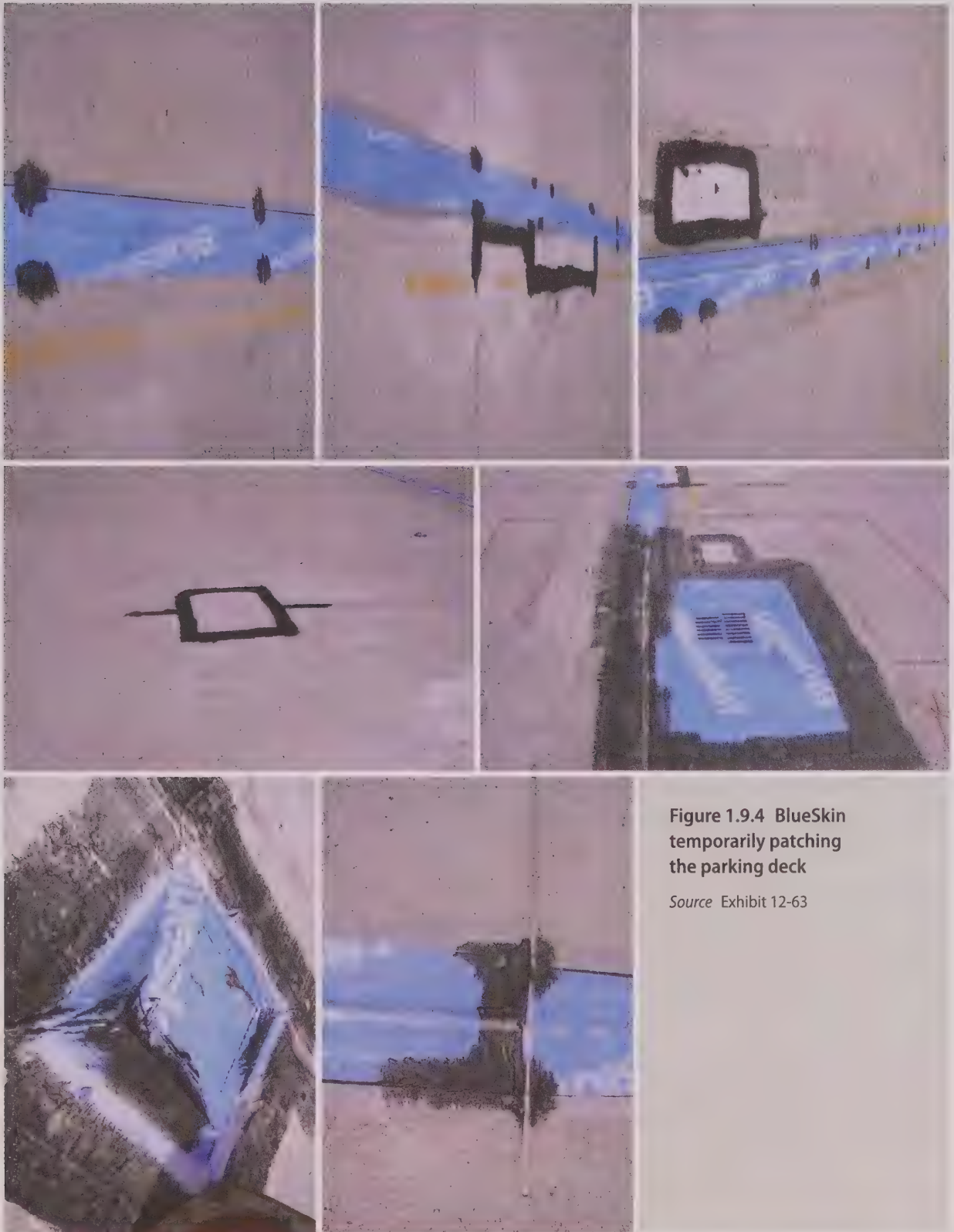
### **Peak Restoration is fired and not replaced; Eastwood has no plan to fix the roof**

Bob Nazarian met with Mr. Fabris, Mr. Sennett, Mr. Day, and Mr. England at his office on July 16. Mr. England and Mr. Day assured Mr. Nazarian that the roof was not leaking any more. Mr. Sennett and Mr. Nazarian had received Mr. Holford’s report of earlier that day, and the group discussed the fact that the roof could not support the proposed membrane system. They decided to meet at the Mall the next morning, July 17, to assess the situation.<sup>251</sup>

Bob Nazarian went to the Mall the next morning. He met Mr. Fabris, Mr. Day, Dimitri Yakimov (who had been hired by Eastwood Mall), and Robert Cousineau, Mr. Day’s foreman. There were numerous leaks. Mr. Fabris testified that many tiles had come down in the food court. He could hear water running in Zellers through the closed doors. Mr. Fabris dictated a memo to his file which succinctly describes the situation:

We proceeded to view the leaks then went to Zellers. The Zellers store was a complete disaster. On every main flex joint buckets were strewn through the building and copious amounts of water were entering.

As we inspected the premises, one of the ladies working at Zellers asked us to go into Receiving and view the area. We went in, it was a disaster.<sup>252</sup>



**Figure 1.9.4 BlueSkin temporarily patching the parking deck**

Source Exhibit 12-63

Bob Nazarian then spoke to Mr. England, who told him that the BlueSkin was only a temporary patch to prevent more leaks until the membrane could be installed (see figure 1.9.4). Before that could be done, the top deck would have to be sandblasted and cleaned, the BlueSkin ripped out, and the primer installed.<sup>253</sup>

Mr. Nazarian told Mr. Day his contract was over. Mr. Day presented an invoice for the work he had done, which he claimed was unpaid, in the amount of \$97,098.75.<sup>254</sup> That invoice was never paid.<sup>255</sup> Mr. Cousineau continued for a short period to supervise the repair work on the roof, but he was then terminated as well.<sup>256</sup> Mr. England was relieved of his duties as Mall manager and became a leasing consultant. He stopped working for Eastwood some weeks later.<sup>257</sup> Ms. Laroue was appointed Mall manager.<sup>258</sup>

On July 17, the day of the morning visit to the Mall, Mr. Fabris wrote to Mr. Clinckett, advising him that it appeared the proposed application of 3 inches of asphalt would not meet the load capacity of the roof. He had no further dealings with Mr. Clinckett.<sup>259</sup>

### **Bob Nazarian repairs the damage but knows he needs a permanent solution**

Before he was terminated, Mr. Cousineau assisted with peeling off the BlueSkin and patching those areas with concrete.<sup>260</sup> Bob Nazarian testified that he worked with the Mall maintenance employees and, “within a few days,” they had the roof in better shape than before Mr. Day started his work.<sup>261</sup> Mr. Nazarian also testified that, from that point on, he or regular employees of the Mall performed all work on the roof and that he made all technical decisions about the roof himself.<sup>262</sup> Although engineers were consulted from time to time, any plans they proposed were never acted upon. Eastwood returned to the method that had been used since the Mall was built – maintaining (not fixing) the roof by attempting to remove and restore caulking that had failed and applying new caulking in new cracks and leaks. The Mall continued to leak as it always had.

### **Eastwood continues to look for money**

Dimitri Yakimov was born in Ukraine and received a diploma in electrical engineering from a professional college there. He studied economics at Moscow University but emigrated to Canada before graduating. He has worked in the construction industry in this country since 1998 and has attended a number of courses on the Ontario *Building Code*, the *Occupational Health and Safety Act*, the *Construction Safety Act*, and related regulations.<sup>263</sup>

In 2008, Mr. Yakimov’s wife worked at the Hotel at the Algo Centre. Bob Nazarian spoke to him about the problems he was encountering with leaks and Mr. Day’s work.<sup>264</sup> On July 14, 2008, Mr. Yakimov met with Mr. Elliott of ELNOS to discuss Eastwood’s attempt to obtain a grant to assist with the roof repairs. Mr. Yakimov testified that at this meeting, which he said he was asked to attend by Mr. Nazarian, he presented some invoices that purported to show that Empire Roofing had done specific work on the roof and had billed Eastwood for it. I will discuss these invoices later, but it is clear that he could not have presented them to Mr. Elliott on July 14. They bear the typed date of August 18, 2008, a month after the meeting.<sup>265</sup> Mr. Yakimov also testified that he told Mr. Elliott on July 14 that Mr. Nazarian’s application for support was “all hogwash and he shouldn’t get involved in it.”<sup>266</sup> Mr. Elliott’s notes and evidence make no mention of it. I do not accept this evidence.

Bob Nazarian testified that he knew nothing about this meeting and that he did not tell Mr. Yakimov to meet with Mr. Elliott.<sup>267</sup> I have difficulty giving his denial any credence. Mr. Yakimov worked for Eastwood. He had no reason to meet with Mr. Elliott other than to advance Eastwood’s interests. I conclude that Mr. Nazarian asked Mr. Yakimov to meet with Mr. Elliott to see if ELNOS could be persuaded to provide financial assistance to Eastwood.



Mr. Elliott testified that, at that meeting, Mr. Yakimov introduced his wife to him as the new Mall manager and said that he had been hired to oversee the ongoing repairs to the Mall and to work with community members to try to garner support and secure financing. Mr. Yakimov was asking what Eastwood had to do to get funding from ELNOS. Mr. Elliott told him what he had told Bob Nazarian in the meeting on May 30 – that he needed a business plan, financial statements, and some assurance that the repairs would work – but that Mr. Nazarian had “poisoned the ground” with the earlier meeting and that it was probably a lost cause to come to ELNOS.<sup>268</sup> In my view, it is much more likely that the meeting transpired as Mr. Elliott describes. He testified in a straightforward manner. If he was indeed warned by Mr. Yakimov about Bob Nazarian’s “shām,” surely he would have noted it or remembered it when he testified. Mr. Yakimov’s evidence was implausible on its face. A letter he wrote to Mr. Fabris on September 10, 2008, with which I will deal in more detail below, significantly corroborates Mr. Elliott’s evidence.<sup>269</sup>

## The Royal Bank sends in a property inspector and threatens to put the mortgage in default

The Royal Bank, the administrator of the mortgage on the Mall, had sent a notice that it would be conducting an inspection on July 17, 2008. The notice indicated that the bank’s contact was Mr. England, identified as the manager, and it contained a questionnaire that had been filled in and returned to the bank. That questionnaire included the following:

**Describe in detail, what Repairs, Replacements or Improvements have been or will be made this year. Please provide a dollar estimate as well.**

[The answer provided was]

1. We are in desperate need of \$3 million dollars renovation mainly the roof, interior of the Mall, and the parking lot. Without this capital, we will lose our major tenants, namely: Zellers, The Library of Elliot Lake & the Bank of Nova Scotia and others.

...

### **Additional Comments**

The Library of Elliot Lake presently located in the Mall 8,500 S.F. would like to expand to 10,000 S.F. with higher rent. Their major condition is the repair of the roof immediately or they would move out completely and vacate.

Zellers, our major tenant (over 45,000 S.F.) has threatened to move out if the roof is not repaired immediately.

We do not have the funds to repair the roof, therefore we have asked Mr. Jim Paterson [*sic* – should be Davison]/the Manager of RBC and so far we have been ignored. Also, according to our mortgage documents RBC owes us \$300,000.00 security deposit (upon signing the mortgage they have held \$150,000.00 and \$5,000.00 per month for 30 months for the total of \$300,000.00) and our demand to retrieve the said deposit has been ignored.

This is to inform you that we are in verge of loosing the Mall if we do not receive sufficient funds for the repairs and maintenance of the Mall.<sup>270</sup>

Bob Nazarian testified that he dictated this information and that his wife filled in the form. He explained that the \$3 million figure covered finishing off the roof and complete renovation of the Mall and Hotel. He wanted to tell the bank this amount because, as he testified, he “was desperate to get some funds to put in the bank – in the Mall.”<sup>271</sup>

This request was not a good idea. The inspector arrived on July 17, 2008, the day that Mr. Day's contract was terminated. As Mr. Fabris testified, conditions in the Mall got worse as the day progressed. "The rain didn't let up. And basically, I think there was very little of the Mall that wasn't soaked. Zellers, they had tarps over almost every aisle of goods. . . . there was a lot of water coming in. It was sad." Bob Nazarian told Mr. Fabris that he was concerned about the loan being called because the inspector would see the Mall's condition on that day.<sup>272</sup>

On July 23, 2008, Mr. Davison forwarded the inspection report to Mr. Mand, Mr. Nazarian's lawyer. He wrote:

As indicated in the report there are several deficiencies noted in the property. We are also attaching the cover letter for the Inspection which notes that approximately \$3,000,000 will be required in order to cure the deficiencies. The Master Servicer has been provided with a copy of the report and based on the condition of the mall are contemplating default proceedings. They have requested a reasonable and achievable strategy or plan from the Borrower within 15 days to cure the deficiencies noted in the report . . . We look forward to receiving the Borrower's strategy to rectify the property deficiencies.<sup>273</sup>

The report was damning. The property received an overall rating of "poor," and the report noted, on the cover page, that there were major deferred maintenance issues and health and safety issues. The deferred maintenance issues were described as "parking deck repairs / replacement" at a cost of more than \$1 million and "[s]tructural issues need to be assessed and repairs completed." The report also noted that ceiling and mould issues needed repair and the roof needed to be repaired or replaced. It read, in part:

There has been a marked deterioration in the property over the last year. The roof of the hotel needs complete replacement and the concrete parking deck over the retail component also needs major work and/or replacement. The leaking parking deck roof is severe and three major tenants, Zellers, Scotiabank and the town library have indicated they will vacate the mall without immediate roof repairs. *Many structural issues are present due to the water leakage issues and formal engineering study is required on the integrity of the structure . . .*

All spaces below the parking deck have severe leaks and *the water damage is extensive, causing structural and mold issues . . .*<sup>274</sup> [Emphasis added.]

Forty photographs were appended to the report, with cutlines that identified more concerns. Photos of Zellers showed buckets set out to catch leaks, and noted that "hundreds" of such buckets were in use and "hundreds" of ceiling tiles in the store had been damaged (see figure 1.9.5). Bladders and hoses to collect water were depicted in the food court. Smell of mould was noted at the Bank of Nova Scotia. The photos showed deteriorating concrete and rusted structural members under the walkway on the south side of the Mall. A photo of the interior of the Library showed a steel column wrapped in plastic with the comment, "[M]oisture will no doubt speed the rusting process."<sup>275</sup>

Bob Nazarian denied having seen this report.<sup>276</sup> He also testified that he could not recall Mr. Mand telling him that the bank had discovered serious deficiencies and wanted to know how Eastwood was going to fix them, but agreed that he "probably" did tell him that.<sup>277</sup> He did admit that Mr. Mand told him that the inspection required a formal engineering study on the integrity of the structure.<sup>278</sup>

Although he initially testified that he had asked the Mall manager\* to contact the engineer Robert Wood to prepare the "formal engineering study . . . required on the integrity of the structure," he later admitted that he could not recall doing so. He did not obtain any such report as a result of Mr. Davison's email to Mr. Mand that attached the July inspection report.<sup>279</sup> He did not do so until October 2009, after the chief building official, Bruce Ewald, ordered him to do so, and even that report was not what had been required.

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\* The Mall manager was initially misidentified as Rhonda Bear, but this was corrected the next day to Ms. Laroue when Bob Nazarian realized that Ms. Bear did not start to work for Eastwood until 2011.



**Figure 1.9.5** Conditions at the Zellers store, Library and food court during an inspection, July 2008

Source Exhibit 1391



Mr. Davison did not let this issue drop. On August 8, 2008, he emailed Mr. Mand, asking when he would receive “your client’s strategy to remedy the property deficiencies.” Mr. Mand responded the same day, saying, “Jim we are working on it. By early next week.” Not having received the information, Mr. Davison wrote again on August 13, asking when he could expect the strategy.<sup>280</sup> There then followed a series of emails showing an increasingly impatient attitude on the part of the bank and an increasingly defensive attitude on the part of Mr. Mand:

- August 19 from Mr. Davison to Mr. Mand:

Mr. Mand, further to our emails below dated July 23, 2008, August 8, 2008 and August 13, 2008 and your subsequent telephone message to me, we have not as yet received a response to our request for a strategy to rectify the property deficiencies. We would remind you that this constitutes a default under the mortgage. Please advise when we will receive a strategy in order to rectify the deficiencies. Thank you.

- August 19 from Mr. Mand to Mr. Davison:

We are diligently working on a multitude of strategies to remedy the deficiencies, but as you know any palpable strategy will require significant capital. Unfortunately, our client does not have the capital on hand to inject into a remedial strategy. We have discussed refinance options; but the terms of your mortgage prevent a take out without a defeasances penalty. My client is unwilling to defease your mortgage using the defeasances quote; but is ready willing and able to refinance and take out your mortgage provided you are prepared to accept principal and interest to date in full satisfaction.

As you can no doubt appreciate, we have a small window of opportunity whereby both parties can receive relief, but the relief can only be achieved through cooperation. Please advise if you will be willing to accept principal and interest to date without any prepayment penalty in full satisfaction of the amount owed to you under your mortgage.

- August 20 from Mr. Davison to Mr. Mand:

Mr. Mand, thank you for your prompt reply. While Prepayment of the Loan is not allowed per clause 3.08 of the Charge, we would be prepared to recommend acceptance of prepayment of the loan but only with full yield maintenance.

As you know several tenants are threatening to leave the property or withhold payment. We would ask what immediate or short term measures have been or are in the process of being implemented in order to stop the water leakage.

We are somewhat dismayed that the property has been allowed to deteriorate to this extent. A review of the financial statements shows that there has been surplus cash flow from the property and we are surprised that the excess funds were not set aside in order to properly maintain the property.

- August 20 from Mr. Mand to Mr. Davison:

For the purposes of clarity,

1. What would the “Full yield maintenance amount” be?
2. I know that short-term remedial works are underway. I will speak to my client and obtain a brief narrative of what has been done to mitigate against further water damage.

- August 20 from Mr. Davison to Mr. Mand:

Mr. Mand, the full yield maintenance is \$454,867 as of today’s date ... We look forward to receiving the narrative on what has been done to mitigate the water damage ...

- August 27 from Mr. Mand to Mr. Davison:

Jim, I can confirm that remedial works are already under way. I have correspondence in my file that confirms it. I do not believe that it will be a problem, but I must obtain the consent of my client before forwarding it to your attention. But rest assured that there is a crew at the location already working.

- August 27 from Mr. Davison to Mr. Mand:

Paul that is good to know. Please obtain your client's consent and forward the information in order that we may report to the Master Servicer.

- August 29 from Mr. Mand to Mr. Davison:

Dear Jim, I spoke with Bob, he has authorized me to forward the documents to you. I unfortunately, am in court all day today, and leaving for the long weekend. I will forward same to your attention first thing Tuesday morning.

- September 3 from Mr. Davison to Mr. Mand:

Paul, have you forwarded the correspondence confirming remedial works with respect to rectifying the deficiencies that were identified in the property inspection report are under way?

- September 3 from Mr. Mand to Mr. Davison:

Jim I have forwarded your last email to my clients; and am awaiting instructions. I know that they are in Elliot Lake. I will call them tomorrow for further instructions. I apologize for the delay.

- September 5 from Mr. Davison to Mr. Mand:

Paul, as we must report back to the Master Servicer, please advise when we will receive the requested information.

- September 8 from Mr. Mand to Mr. Davison:

I apologize for not responding sooner to your requests for information. Enclosed please find an executed contract which outlines the remedial works necessary to correct the deficiencies at Elliot Lake. As I confirmed to you previously, the remedial works are already underway. Please review and advise.<sup>281</sup>

There were no work crews at the Mall other than Eastwood's normal maintenance workers doing what had been done since the Mall was constructed – removing debonded caulking and reapplying new. Furthermore, the "executed contract," as will be seen, was not real.

## The Nazarians respond to the bank's demands by producing false documents showing they are fixing the roof

Although Eastwood did not retain an engineer to review the integrity of the Mall's structure, Bob and Levon Nazarian went to great lengths, after the inspection report and first demand were sent on July 23, to attempt to show the Royal Bank that they had a legitimate "strategy to remedy the property deficiencies."

## Andrew Holford is asked to come up with an alternative, but it is rejected because of the cost

Mr. Holford testified that, after he told Bob Nazarian that he did not believe the structure would support the waterproofing system proposed by Mr. Clinckett, he was asked to find another way to stop the leaking.<sup>282</sup> He told him that a "thick" system like the one proposed by Mr. Clinckett could be installed if the 3-inch concrete layer was removed and the hollow core slabs were covered with a membrane and asphalt overlay. Mr. Holford testified that Bob Nazarian rejected this method because of the extra cost of removing the concrete. Bob Nazarian agreed that he rejected it but said the reason was not because of the cost but because he concluded it was not feasible to jackhammer concrete while people were in the space below.<sup>283</sup>

Mr. Holford also testified that, by the beginning of August, the only option he was considering was a "thin" membrane system that would not have been covered with a thick asphalt wearing course. It would, however, have required significant ongoing maintenance. Snow removal would have to be carried out with rubber-bladed

plows. Care would have to be taken not to damage the membrane at joints. Sand would abrade the membrane. He presented this idea to Bob Nazarian, who rejected it because of the maintenance and the system's susceptibility to damage.<sup>284</sup> Bob Nazarian confirmed that testimony, saying he had concluded that the thin system would not work.<sup>285</sup>

On July 31, 2008, Mr. Gagné, the Sudbury engineer from Trow, emailed Mr. Holford, writing: "[O]nce the crack sealing is designed by yourself, we will be ready to carry out the quality control on site." He noted that he was not sure whether they had experienced contractors in the area who could provide the quality of work that Bob Nazarian would be looking for. Mr. Holford responded by telling Mr. Gagné that he was currently reviewing numerous thin systems for waterproofing the slab. On August 6, Mr. Gagné replied that he was discussing the project with an experienced senior waterproofing system applicator from the Sudbury area, and asked Mr. Holford if he was considering two specific systems in which that person had experience. Mr. Holford replied in the affirmative. All these emails were copied to Mr. Nazarian.<sup>286</sup>

On August 7, 2008, Bob Nazarian wrote to Mr. Holford and Mr. Gagné and asked them if they could order material for the new expansion joints or if his workers could prepare the roof for the new material.<sup>287</sup> Mr. Holford told him that his crew did not have the necessary skills to carry out this work.<sup>288</sup> Mr. Nazarian denied having been given this information. I accept Mr. Holford's evidence on this point. Mr. Holford also told him that it was not the consultant's role to order materials.<sup>289</sup>

Mr. Gagné proposed a meeting with Bob Nazarian and his local contractor, Brad Shaw of Fibron Insulation Inc., to take place on August 13, 2008, at the Mall. He asked Mr. Holford to report on how the design was coming along, and Mr. Holford told him he was putting together the specifications, a tender form, and some detailed drawings, which he would send to Mr. Nazarian. Mr. Holford testified that he saw his role at this stage as a "specifier" – laying out the specifications for the system to be installed.<sup>290</sup> Mr. Holford had never entered into any written agreement with Mr. Nazarian after he was contacted on May 26. On August 6, 2008, his firm, Kleinfeldt Consultants, issued an invoice to Eastwood in the amount of \$3,425.19. On August 13, 2008, he received a letter from Mr. Fabris, which stated, in part:

I have had the opportunity of reviewing your invoice of August 6th, 2008. Mr. Nazarian and myself are quite concerned with [the] fact that while you do make reference to options, we have yet to receive anything in writing or any calls from you dealing with such options.

I note that the window of opportunity for fixing the roof of the mall is closing fast. Given the type of summer weather that we have had, I doubt that the fall will be any better.

I would appreciate receiving from you at your earliest convenience a copy of the projected work options for the mall and roof, kindly copy Mr. Nazarian on this as well.

As we are under a very strict timeline for this project, I would appreciate your immediate attention to this matter.<sup>291</sup>

This exchange resulted in a meeting between Steven Blaney, the president of Kleinfeldt, and Bob Nazarian to discuss the work that had been done, a letter to him detailing that work, and a formal proposal on August 21, 2008, setting out the services which Kleinfeldt was prepared to provide should Mr. Nazarian choose to retain it. That proposal was for engineering services "for the proposed restoration of the parking structure / shopping mall roof at Algo Mall." Shortly after this proposal was sent out, Mr. Holford received a voice message from Mr. Nazarian that he would not be going forward with the proposal. That was the last time Mr. Holford heard from Mr. Nazarian.<sup>292</sup>



## **A contract is signed with Fibron to convince the Royal Bank that work is being done, and then resiled from**

While Eastwood was questioning Mr. Holford's fees and bringing its relationship with him to an end, Bob Nazarian and Mr. Sennett were dealing with Mr. Gagné and with Mr. Shaw of Fibron to create the illusion that Eastwood had a "strategy to rectify the property deficiencies" as demanded by RBC.

On August 15, 2008, at 12:52 p.m., Mr. Shaw sent a quote for the repair work on the parking deck to Bob Nazarian.<sup>293</sup> The quote was only for the roof deck butt repairs, and only over Zellers, Scotiabank, and Northern Reflections – an area of about 5,000 square feet. The quote was on a time and material basis, rather than a fixed price, with an initial material cost of \$36,573, which had to be paid before any work would start.<sup>294</sup> Bob Nazarian forwarded it to Mr. Sennett, Mr. Gagné, and Mr. Mand (who was dealing with Mr. Davison of the bank) later the same day.<sup>295</sup> As Bob Nazarian admitted, he sent Mr. Shaw's quote to Mr. Mand so he could send it on to Mr. Davison, who had, as recently as two days before, been asking when he could expect the "strategy to remedy the property deficiencies" so he could show it to the mortgage investors, who were considering whether to put the mortgage into default.<sup>296</sup>

Mr. Mand replied later that same day, copying Mr. Sennett: "Further to my telephone conversation with Alex this afternoon, I require a complete cost analysis of the work required to remedy the roof at Elliot Lake."<sup>297</sup> Mr. Nazarian forwarded that request to Mr. Gagné the next day, August 16, with a request: "Hi Dan please respond to my lawyers [*sic*] letter."<sup>298</sup>

In the meantime, Mr. Sennett had signed off on Mr. Shaw's quote on behalf of the corporation. He sent an email to Mr. Shaw at 5:49 p.m. on August 15:

I am the signing authority for this corporation. I have signed this quotation in order for us to obtain a mortgage for the company. I discussed with Mr. Bob Nazarian and he will get in touch with you or call me if you need any additional info.

We are in the process of obtaining a full mortgage for this property.<sup>299</sup>

Mr. Sennett testified that he signed the contract and sent the email, simply because Bob Nazarian asked him to. He said he did not question him. He did not know what he was doing, other than that he wanted to get financing to "build a roof." It was his evidence that Mr. Nazarian told him to deal with the Fibron contract on his behalf.<sup>300</sup>

Bob Nazarian denied that he had told Mr. Sennett to sign the contract or given him authority to do anything on behalf of Eastwood. When asked why, if he did not want the contract with Fibron signed, he sent it to Mr. Mand to be sent on to the bank, he reversed his earlier evidence and denied that he had sent it to Mr. Mand to send on to the bank – he claimed that he was seeking Mr. Mand's advice about what to do with Fibron. He gave this evidence even though he admitted he knew the bank was asking for his strategy to deal with the roof and Mr. Mand was telling him he needed something to give to the bank.<sup>301</sup>

A few days after the contract with Fibron was signed and sent to Mr. Shaw, Bob Nazarian spoke to him and told him that Eastwood would not be hiring Fibron to do the patching work. Mr. Shaw sent Bob Nazarian an email on August 20, 2008:

You have signed the contract and now are backing out of it. Are you willing to pay for the up to date expenses on the contract.

I have notified Trow Consultants that we will not be involved in this project further. We have been asked repeatedly to proceed by you and your partners signature A Sennett signing my contract to proceed with the work that was forwarded to our office. We will be making claim for our time and expenses to date.<sup>302</sup>

I can only conclude that Bob Nazarian asked Mr. Sennett to sign the contract with Fibron so that he could later back out of it, taking the position that it was signed without authorization and that, as he testified before me, “we didn’t have any contract with this company.”<sup>303</sup> Just as when he had Mr. England sign the contract with Peak Restoration on June 27, he wanted to avoid giving a binding commitment. He made a promise that he did not intend to keep, so the bank could be placated.

I heard no evidence that the quote and contract with Fibron was sent to the Royal Bank. It appears from the continued requests into September from Mr. Davison to Mr. Mand for proof that work was being done on the roof that it was not. Certainly Mr. Mand was not satisfied with it – he asked for a “complete cost analysis” on August 15.

Even Mr. Nazarian acknowledged in his evidence that it was possible he had told Mr. Shaw that Eastwood would not be proceeding with the contract because he had another plan for satisfying the bank.<sup>304</sup> As will be seen, Bob and Levon Nazarian did come up with another plan – the creation of another false contract between Eastwood and Empire Roofing.

### **Trow Engineering is not retained, and its plans to repair the roof are not followed**

Shortly after backing out of the contract with Fibron, Bob Nazarian decided to use his own workers on the roof and not to follow the plan for the butt joint designed by Mr. Gagné of Trow Engineering or Mr. Holford’s plan for the repairs to the expansion joint. He testified that he did so because “we were saving money that way.”<sup>305</sup>

On August 26, Mr. Gagné emailed Bob Nazarian in response to his email of August 16, which had asked Mr. Gagné to respond to Mr. Mand’s email seeking a complete cost analysis for the roof repair work. He copied Mr. Mand with his email. He wrote:

Hi Bob, I was away all last week on holidays and just got back in the office this morning. In response to your request I will finalize the cost estimate to repair the roof at the Algo Centre. The cost estimate will include all materials and labour to reseal all butt joints, re-construct the expansion joint seals, and to apply a water proof membrane to the entire deck.

As per our telephone conversation this morning, you stated that the repairs for the butt joints are now being executed by your own forces in lieu of the contractor experienced in this field – Fibron Ins. Inc. You also stated that the design to repair the butt joints as prepared by Trow is not being implemented and that a design and product by Tremco is being used in lieu of the specified Sonoguard SL2 joint sealant. We acknowledge these changes.

Also, you indicated that Andrew Halford [*sic*] will not be providing the design and specifications for the repairs of the expansion joint and you have requested that Trow provide the required design instead. We have attached a project authorization form for your signature since our services seem to be increasing. To date our engineering fees are approximately \$4,000. Upon receiving this written authorization, I will review the Tremco Vulkem WF Vehicular Expansion Joint System as per your request and I will get back to you shortly.<sup>306</sup>

Bob Nazarian testified that he could not recall whether he had signed Mr. Gagné’s project authorization form as requested.<sup>307</sup> I saw no evidence that either Mr. Gagné or Trow was involved in any aspect of the work to deal with the leaks undertaken after August 2008.

### Another false contract with Empire Roofing to satisfy the Royal Bank

In 2008, in an effort to satisfy the City, his tenants, and the Royal Bank that he was diligently working to deal with the leaks, Bob Nazarian had

- hired and then fired Mr. Clinckett;
- held a competition to pick a contractor to fix the roof, publicly announced that C3 Harrell would be hired at a cost of \$1 million to do the job, then refused to sign the contract;
- hired Mr. Holford, refused to follow his advice, questioned his bill, and fired him;
- entered into a contract with Peak Restoration to start the repair of the roof, with no idea of how to finish it, and then fired that company shortly after work had started;
- entered into a phony contract with Empire Roofing to show Zellers that it was fixing the roof;
- spoken extensively with Mr. Gagné, but not retained him or followed his advice; and
- entered into a contract with Fibron to effect a partial patch over the worst areas and then resiled from it.

Despite all these efforts, the Royal Bank was still demanding proof that the repairs would be done and threatening to put Eastwood's loan into default if it was not provided. As a result, Bob and Levon Nazarian decided to create another false contract – and again with Empire Roofing.

On the computer located at Bob Nazarian's home office, a document in the form of a contract between Eastwood Mall Inc. and Empire Roofing and Restoration Ltd. was found. It is signed by Bob Nazarian on behalf of Eastwood and is not signed by anyone on behalf of The Empire Roofing and Restoration Inc. It is a very simple, one-page contract, unlike the false contract signed on June 16, 2008, that was on a standard multi-page construction contract form. It purported to require Empire to

- repair the 220,000-square-foot roof of the Mall "according to the engineers report and instruction [*sic*]" for \$985,000 plus GST;
- restore and renovate the interior of the Mall (described as "removal of the mould and the total renovation of the Mall") for \$1,650,000 plus GST; and
- repair and restore the exterior of the Mall and the Hotel for \$865,000 plus GST.

The total price was \$3.5 million plus GST.<sup>308</sup>

Both Levon Nazarian and Mr. Sennett testified that they had never seen this document before the Commission provided them with a copy.<sup>309</sup> Bob Nazarian testified that Mr. Sennett prepared the document jointly with his son Levon and that he first saw it in Mr. Sennett's office on August 14, 2008, the date of the contract. Despite repeated opportunities, he refused to give a clear answer to why Mr. Sennett had prepared it and what it was to be used for. He testified that Mr. Sennett took it away with him after the meeting. When asked to explain how it was found on his computer at his home office, he testified: "[I]t's not a secret sir. When we sign this he had emailed it to me and it was in my computer." His evidence was that it was emailed to him so that he (Bob Nazarian) was aware that Mr. Sennett was working on it.<sup>310</sup>

As I have indicated, Empire Roofing had no experience with, or ability to handle, construction work. Bob Nazarian and Mr. Sennett had created the company to convince Zellers that work on the roof was underway. I conclude that this contract was signed by Bob Nazarian for a similar purpose although I heard no evidence to that effect – perhaps because a more complicated set of false documents was created and used instead, as I describe below.



On August 18, 2008, Bob Nazarian signed, on behalf of Eastwood, the last page of a nine-page document, described on the cover page as “Roof Repair Contract for Algo Centre.”<sup>311</sup> Mr. Sennett signed on behalf of The Empire Roofing and Restoration Inc., described on that page as the “contractor.” Levon Nazarian signed as a witness. The last page had a logo in the upper right-hand corner reading “LeVön,” which was used by Levon Nazarian in a project management business that he testified he had started after he graduated from university in 2008. The document had a number of columns which listed prices for various stages of work (see Table 1.9.1).

**Table 1.9.1 Roof Repair Contract From Empire Roofing**

Contractor	Concrete	Drainage system add-on	New drain installation	Additional caulking to structures on concrete deck	Temporary patching	Expansion joints	Sealants	Total contract value
The Empire Roofing and Restoration Inc.	310,388.00	231,655.00	488,655.00	98,167.00	88,756.00	323,200.00	115,168.00	1,655,989.00
							Discount	
							Sub-total	1,655,989.00
							GST	82,799.45
							Total	1,738,788.45

Source: Exhibit 3773

Each of the second to eighth pages in the “contract” was a document in the same form, described on the top as an “invoice” from Empire Roofing. Each invoice set out details describing the scope of work of each of the categories described in the chart above, with the price for each being the same as the price in the chart. For example, the “temporary patching” described the work as “Expose problem areas by removing existing failed materials and replace with new concrete.”<sup>312</sup>

Levon Nazarian testified that he created this document (other than the cover page) for Mr. Sennett to use “for funding purposes.” He said that Mr. Sennett had provided him with the contents of each of the invoices, which had not been intended to be invoices but rather descriptions of the work to be performed by Empire Roofing. He did so on August 18, 2008, the same day the documents were signed. It was his evidence that each of the three signatories – he, his father, and Mr. Sennett – signed the document in a brief meeting in his office.<sup>313</sup>

Levon Nazarian testified that he understood that the document was a legitimate, *bona fide* contract between Eastwood and Empire Roofing, even though Mr. Sennett had no experience in construction work. He thought that Mr. Sennett would not do the work but would supervise it after hiring the “appropriate professionals or GCs [general contractors].” He understood that Empire Roofing would use the contract to get funding – by borrowing money to pay the workers it would hire to do the job for Eastwood. He could not explain why he thought that the contractor, rather than the owner, would borrow the money to pay for the work it had been contracted to carry out.<sup>314</sup>

Mr. Sennett testified that Levon and Bob Nazarian prepared the document, and he was asked to sign it. He said that Levon Nazarian told him that \$1.7 million, the price of the contract, was the amount of funds needed to repair the Mall. He testified that he understood that this price was “an estimate they will need to present it to whoever they were going to get financing from.” He admitted that it could appear to someone reading the document that Empire Roofing was going to do the work described in it, but that was not his understanding. He testified that he thought it was prepared to obtain finances. He could not explain whom he expected the financing to be obtained from.<sup>315</sup>

Bob Nazarian testified that this document was prepared by Levon Nazarian as Mr. Sennett's "secretary, if you like," and signed by him and the other two in Levon Nazarian's office on August 18, 2008. It was his evidence that he signed it because Mr. Sennett told him to do so. When asked if he thought it was a contract, he answered: "I don't know. I did not think about what I was doing." He then testified that he thought that Mr. Sennett would use the contract to get a government grant to pay for the work. He did admit that he knew Mr. Sennett was going to take the document and show it to whomever he was trying to get funding from.<sup>316</sup>

This contract was signed three days after Bob Nazarian had sent the quote received from Mr. Shaw at Fibron to Mr. Mand so he could use it to satisfy the Royal Bank. Mr. Mand, however, had told him that it was not enough; he needed a complete cost breakdown – just what the contract with Empire Roofing provided.

On September 8, 2008, Mr. Mand finally provided to Mr. Davison at the Royal Bank what he described as the "executed contract which outlines the remedial works necessary to correct the deficiencies at Elliot Lake." He also said that the "remedial works were already underway." The "executed contract" provided to Mr. Davison was the August 18, 2008, contract between Eastwood and Empire Roofing. A copy of that email and its attachment was sent to Bob Nazarian. As he admitted in his evidence before me, he knew that, contrary to what Mr. Davison was being told by Mr. Mand, the remedial works outlined in the contract with Empire Roofing were not underway on September 8.<sup>317</sup>

If any more evidence were needed that the August 18 contract was a complete sham, I note that the descriptions of the services to be rendered for each of the seven activities set out in the invoices and summarized on the last page are identically worded to the provisions of the contract provided by Mr. Day to Eastwood on June 22, 2008, and signed on June 27, 2008.<sup>318</sup> The prices are only slightly different. One might ask why the signed contract with Peak Restoration was not provided to the Royal Bank. Perhaps the reason is that the portion requiring the installation of the waterproofing membrane had been deleted. The Nazarians needed a contract that showed that the entire job was being done.

It is clear to me that Bob Nazarian, Levon Nazarian, and Alexander Sennett knew that the contract of August 18, 2008, was a sham. Bob Nazarian, at a minimum, knew that, when Mr. Mand provided Mr. Davison with the contract, he was providing him with false information, designed to forestall the mortgage loan being put into default. I should indicate that I have heard or seen no evidence to suggest that Mr. Mand knew the information he was passing on to the bank was in any way incorrect.

## **Eastwood tries again to get funds from ELNOS, using the false contract**

The sham contract of August 18 was also used in another attempt to get money from ELNOS. On September 9, 2008, the day after it was sent to the Royal Bank, Mr. Sennett also sent it to Mr. Elliott, with a copy to Bob Nazarian. It was sent as an attachment to an email that simply read: "Please find the requested document attached to this email on Behalf of Bob Nazarian."<sup>319</sup>

Mr. Sennett testified that he sent this document to Mr. Elliott because Bob Nazarian asked him to. It was his evidence that he could not recall seeing the invoices which made up the middle seven pages of the contract, and that he forwarded the attachment without opening it. I cannot but have serious doubts about this evidence. Mr. Sennett had already testified, as outlined above, that he signed the contract on August 18. I accept Levon Nazarian's evidence that he prepared the contract, and that he prepared the entire document on August 18. When Mr. Sennett signed it, the document contained the entire 10 pages. He has admitted he knew that it was being signed for the purpose of obtaining financing for Eastwood. The effect of having the contract sent to ELNOS by Mr. Sennett, identified in the contract as the signing authority for Empire Roofing,

was to give the impression that this document was a legitimate contract between Eastwood and a third party, Empire Roofing. The fact that the contract contained invoices directed to Eastwood from Empire Roofing substantiated the impression that Empire Roofing had either done, or was about to do, the specific work outlined. This was the way in which the contract was to be used to obtain financing.

The next day, a telephone message slip from Mr. Elliott's office shows that Bob Nazarian had called and wanted him to return the call. The slip indicated that the call was "urgent."<sup>320</sup> The same day, September 10, 2008, Mr. Fabris wrote to Mr. Elliott, enclosing yet another copy of the August 18 contract and stating:

I have been asked by Mr. Bob Nazarian to ascertain as to what stage the loan application is with respect to the repairs at Eastwood Mall.

I spoke with Demitri [*sic*] on this matter, and he indicated that you were waiting for some sort of confirmation from Eastwood Mall Inc., that they were in a position to finance \$200,000.00 of the work.

I can advise you that currently work is undergoing, Eastwood Mall has undertaken the role of general contractor, and over \$200,000.00 of work has been performed on the roof including, the purchase and changing of expansion joints and re-caulking of all of the seals.<sup>321</sup>

Mr. Fabris testified that Bob Nazarian asked him to follow up on the loan application that Mr. Fabris understood had been made by Mr. Sennett and Mr. Nazarian in their meeting on May 30 and was the subject of Mr. Yakimov's inquiry of July 14. Mr. Sennett gave him the contract that he sent to Mr. Elliott. He understood, from speaking to Mr. Yakimov, that all Mr. Elliott was waiting for was confirmation that Eastwood could finance \$200,000 of repairs from its own funds. That was the reason, he testified, that he advised Mr. Elliott that over \$200,000 of work had been performed and that Eastwood was acting as the "general contractor." When asked how he came to the conclusion that over \$200,000 of work had been carried out, Mr. Fabris pointed to the approximately \$80,000 that had been paid to Peak Restoration, and the cost of the materials purchased since then. It was his evidence that he had seen invoices to substantiate that figure. He admitted, however, that he knew that Eastwood had been using its own forces to do the work to date. He knew that Mr. Sennett was not a roofing contractor, had not done any work at the Mall, and was not in a position to perform the contract. He testified, however, that he thought that Empire Roofing may have been able to hire subcontractors to do the work.<sup>322</sup>

Bob Nazarian confirmed that he knew that Mr. Sennett was sending the contract to Mr. Elliott to help Eastwood get a grant. He had asked Mr. Fabris to send the letter with the contract because he wanted Mr. Elliott to think that work was being carried out under it.<sup>323</sup>

Mr. Elliott replied to Mr. Fabris the day he received the letter. He recounted the meeting on May 30 with Bob Nazarian and Mr. England and noted that, during that meeting, he had made it "explicitly clear that no funding would be forthcoming unless it was supported by a fully developed business plan. This plan was to include an engineer's report that the planned repairs would indeed solve the water intrusion problems as well as a forecast of revenue streams." He noted that Mr. Yakimov had been told on July 14 that nothing had been received, and the situation had not changed. He told Mr. Fabris, in that letter, that the "quote" attached to Mr. Sennett's email of the previous day was not enough information for ELNOS to commence a loan application.<sup>324</sup>

Mr. Fabris testified that he spoke to Mr. Elliott, who told him that the application was "nowhere." Mr. Elliott had concerns about comments Bob Nazarian had made in his meeting with him on May 30, 2008, about starting the job without the ability to pay for it. He also told Mr. Fabris that he thought the contract was not valid.<sup>325</sup>

Mr. Elliott was more blunt in his evidence. He testified, and I accept, that he told Mr. Fabris that his client had asked ELNOS to participate in perpetrating a fraud on the contractors, and that he was wasting his time if he continued to pursue ELNOS as an option for financing the repairs.<sup>326</sup>



This reaction caused Mr. Fabris to speak to Bob Nazarian within the next week about the legitimacy of the contracts, something he had not done before sending the letter. Bob Nazarian told him that Empire Roofing had been set up to obtain financing for the roof project because Eastwood could not obtain any further financing owing to the restrictive covenants in the mortgage being administered by the Royal Bank. Mr. Fabris agreed that it was absurd to expect a contractor to borrow money from a bank or obtain financing from a government agency so that it could perform a contract for an owner who did not have the money. Mr. Fabris provided Bob Nazarian with his advice, and he understood that, shortly thereafter, Mr. Nazarian decided not to pursue the scheme.<sup>327</sup>

Bob Nazarian gave evidence about the advice he had received from Mr. Fabris. He testified that Mr. Fabris had told him he did not have a “good feeling about this company.” He told Mr. Nazarian that he should drop it right away and not work with Empire Roofing at all. Mr. Nazarian’s evidence was that he, too, “didn’t have a good feeling” because he could see “that how could a company borrow money and pay himself through – as a contractor to do the job. It doesn’t make sense.”<sup>328</sup>

## **Conclusion: Empire Roofing and its contract were a sham intended to convince others that Eastwood was fixing the roof when it was not**

Having had that epiphany, however, Bob Nazarian did not act on what he characterized as his new-found recognition of the impropriety of the scheme in which he had been involved. He did not notify Mr. Elliott that he was calling off his relationship with Empire Roofing. He testified that he did not do so because “I knew that Mr. Elliott is not satisfied and there is no use to try and patch it.” More importantly, he did not contact Mr. Davison, who had been sent the contract as false proof of efforts being undertaken by Eastwood to fix the roof so that the mortgage loan would not be put into default. He testified that he did not do so because it would be “provocation.” If he called him, he testified,

I am simply telling Mr. Davison, please, start pushing us or start calling our mortgage.  
No, I wouldn’t do that.<sup>329</sup>

Nor did he cease using Empire Roofing. That company invoiced Bob Nazarian for \$14,310 on October 3, 2008, for work described as repairing damage to the roof and ceiling caused by water leaks.<sup>330</sup> That invoice was paid by a cheque from Yorkdale Centres Inc., signed by Bob Nazarian, dated December 4, 2008.<sup>331</sup> Mr. Sennett testified that Empire Roofing had never done the work.<sup>332</sup> Bob Nazarian denied any knowledge of the work, the invoice, or the cheque.<sup>333</sup> On February 13, 2009, a bank draft was issued in the amount of \$10,150 payable to Bob Nazarian from the Toronto-Dominion Bank Beaver Creek branch in Richmond Hill, the branch where Bob Nazarian had set up the account for Empire Roofing.<sup>334</sup> The records for that account show a bank draft in that amount purchased on that date.<sup>335</sup> Bob Nazarian claimed to have no memory of this transaction either.<sup>336</sup> Furthermore, an invoice from Empire Roofing to Eastwood Mall dated February 9, 2009, in the amount of \$320,938.61 for a number of items relating to the Mall repairs, including a “general contract fee” of \$80,000 and supposed payments made by Empire Roofing to Peak Restoration of over \$140,000, was sent to Bob Nazarian.<sup>337</sup> Those transactions showed that, contrary to his evidence that “we shouldn’t continue with Empire Roofing, it’s a mistake,”<sup>338</sup> he continued to treat it as his own company, to be used for his own ends.

I have no hesitation in concluding that Empire Roofing and Restoration Inc. was created and used by Bob Nazarian to facilitate his scheme of convincing those who needed convincing that Eastwood recognized the seriousness of the roof leaks problem and was taking steps to fix it. The truth is he was taking no such steps.

## **The leaks continue at the Mall: The City knows that the leaks raise potential structural issues but still wants the Library to stay in the Mall**

### **The leaks continue**

Over the summer of 2008, Mr. Bauthus testified that the leaks got worse.<sup>339</sup>

The Bank of Nova Scotia closed on August 14, 2008, to allow Pinchin Environmental to carry out work to remediate the damage caused by mould as a result of the leaks. Air samples taken before the work showed that air quality had been affected adversely by the mould growth.<sup>340</sup> During the course of the work, additional mould was found.<sup>341</sup> The bank did not reopen until August 23. Ms. McCulloch testified that during the course of the work, Bob Nazarian stopped by the bank and stated that the work was “completely unnecessary.”<sup>342</sup>

On September 15, 2008, a meeting was arranged between Mall tenants and Ms. Laroue, Mayor Hamilton, and Mr. Bauthus. Minutes of that meeting indicate that Ms. Laroue stated that the meeting had been called to update the tenants about the roof repairs and to “stop rumours.” She told the meeting that repairs had been started on August 3, 2008, that they were based on a report from a “new engineer,” that the “estimated cost for the repairs” was \$980,000, and that testing for mould had been done in different locations in the Mall and had come back normal.<sup>343</sup>

Ms. Laroue testified that Bob Nazarian told her on the telephone, when she was in Mr. Fabris’s office about a week before the meeting, to provide this information to the tenants. She did not believe that he had planned to spend \$980,000 to fix the roof. She thought she was lying when she gave that information to the tenants.<sup>344</sup>

Bob Nazarian continued to provide misleading information about the state of repairs to the roof. On October 8, 2008, the *Elliot Lake Standard* ran a front-page article with the headline “Mall roof leaks now stopped, says owner”:

After spending \$1.1 million in about two years to plug the roof leaks that have plagued the Algo Centre Mall for years, they are all but stopped.

Bob Nazarian, owner of the Algo Centre Mall, says 99% of the leaks are stopped, and the rest will soon be as well.<sup>345</sup>

This account was not true. The leaks had not been stopped, and Eastwood had spent nowhere near \$1.1 million to fix them. The largest expenditure made, other than the purchase of supplies, appears to have been the \$80,000 paid to Peak Restoration in June and July 2008.

### **The City knows about the leaks, and its property standards officer is told about the 2006 Notice of Violation but does nothing**

On September 9, 2008, Mr. Bauthus and Mayor Hamilton met with Councillor Soulière, Ms. Morin, Ms. Croxson, and Gail Lewis, a member of the Library board. Mr. Bauthus prepared a memo to file about that meeting three days later in which he indicated that at least 100 ceiling tiles in the Library were damaged or missing, the ceiling looked dangerous (as if it might fall down), and the patrons were concerned about safety and unwilling to enter some areas. Mr. Bauthus testified that, although he believed that Mayor Hamilton would have agreed, as he did, that this state of affairs was completely unacceptable, he continued to support the Library staying in the Mall after its lease expired in September 2009. It was decided at that meeting that Mr. Bauthus would meet with Ms. Morin and write to Eastwood, identifying specific cleanup work that had to be done either by Eastwood or by the City, with a subsequent offset of its cost against the rent.<sup>346</sup> The notes state:

The issue respecting the reason for the library being in the mall was discussed and indicated that for the ongoing viability of the mall the library is still required in the mall. It was felt that should the city pull out there would be other tenants that would follow suit. The city receives about \$500,000 a year in taxes for the mall.<sup>347</sup>

Mr. Bauthus testified that he supported that position “in recognizing the importance of the Mall to the City.” It was his evidence that it was also the position of the mayor and council.<sup>348</sup>

Handwritten notes taken by Mayor Hamilton during the meeting do not make any reference to this issue,<sup>349</sup> and he did not recall it being discussed. He did agree that it possibly was discussed. It was his evidence, however, that neither he nor council as a whole agreed with the position, as expressed in Mr. Bauthus’s memo, that “for the ongoing viability of the mall the Library is still required in the mall.” He also testified that he did not believe that the presence of the Library in the Mall, and its effect on the Mall’s ongoing viability, played a part in the City’s decision to keep the Library there.<sup>350</sup>

I do not accept that statement. Mr. Bauthus had no reason to make a false observation in his memo to file, which he wrote only three days after the meeting. Mayor Hamilton and City Council had supported the Library staying in the Mall despite the clear evidence of intolerable and unhealthy conditions that persisted notwithstanding constant complaints and a Notice of Violation to Eastwood. As I have indicated before, the best evidence of people’s intentions is what they did. I conclude that Mr. Bauthus’s notes were accurate: Mayor Hamilton and the council had resolved in the fall of 2008 to keep the Library in the Mall despite the leaks because the Mall needed the Library, and the community needed the Mall.

Furthermore, both Mayor Hamilton and Mr. Bauthus were aware of the potential for structural damage at the Mall as a result of the leaks. Mr. Bauthus’s note to file includes a “To Do” list. First on the list is

Follow up with Bruce regarding structural security as a result of water infiltration and rust.<sup>351</sup>

Mayor Hamilton testified that he did not recall that issue being discussed.<sup>352</sup> Mr. Bauthus, however, testified that he was concerned about the possibility of water infiltration potentially causing the steel to be rusting away and thereby affecting the structural security of the building, that that issue was raised at the meeting, and that the mayor must have been aware of his concerns.<sup>353</sup> I accept that evidence.

Unfortunately, as both Mr. Bauthus and Mr. Ewald testified, Mr. Bauthus did not speak to Mr. Ewald about this issue at that time. When asked why, Mr. Bauthus replied, “I can’t answer at this point in time what was the specific issue.” Another opportunity was missed for the City to take steps to inspect the Mall and issue an order to protect the persons who used it.<sup>354</sup>

Ms. Taylor, who attended the tenants’ meeting on September 15, prepared a document setting out the key events with respect to the leaks at the bank location in the Mall. She noted:

The tenants were concerned with health and safety issues and possible mould contamination due to the amount of water and length of time they have been dealing with roof leaks. The Mayor said he was working with the Landlord to ensure the roof gets fixed.<sup>355</sup>

Mayor Hamilton testified that he did not follow up after the meeting to find out what was going on with the \$980,000 repairs that were supposed to have been carried out.<sup>356</sup> He agreed that he had not been “working with the Landlord to ensure the roof gets fixed,” as Ms. Taylor’s note indicated, but denied saying that he was doing so. He did testify, however, that he might have given the impression that he was doing so.<sup>357</sup>



Shortly after this meeting, Mr. Ewald was given written notification of the Notice of Violation that had been issued in October 2006. It did not cause him to take action. On September 18, 2008, Bruce Caughill emailed Mr. Ewald, with a copy to Fire Chief Paul Officer, writing:

Bruce, you and I have not yet met – hope to change that soon as we have a number of active files in Elliot Lake. I was talking with Paul on Tuesday and mentioned that this would follow. Recent publicity on the leaking parking deck reminded me of the matter referenced in the attached letter. The original letter included a commitment to notify you if conditions of our engagement changed – and I had not done that. I was in the mall and on the deck last Thursday preparing a report on the current Eastwood leak repairs to ScotiaBank – who had some major interior water damage recently. If you have any questions, please call.<sup>358</sup>

The letter attached to the email had a subject line of “Notice of Violation October 24, 2006,” and read:

On February 22, 2007 I wrote to CBO Syl Allard, a copy to CFO Paul Officer, regarding this Notice of Violation. It was the intent that we would conduct inspections and prepare a report within 6 months (of February 22, 2007) of that letter.

Despite best intentions we were unable to coordinate sufficiently with the Owner and did not perform any inspections and did not submit any reports on this matter.

Our services on this and other 151 Ontario Avenue improvements were terminated by Eastwood, in a disagreement over payment for services, in July 2007.

Please include these facts in your file on this property.<sup>359</sup>

Mr. Ewald testified that he received this letter, that he knew from reading it that repairs to the leaks were being undertaken on the roof, that a Notice of Violation had been issued on October 24, 2006, that Bruce Caughill had promised to provide an engineering report following the Notice of Violation, and that this report had not been provided. Nevertheless, he did not then go back into the file to review the Notice of Violation. Nor did he go up on the roof to determine whether the work being done would require a building permit. He testified that this correspondence “fell through the cracks.” He had no other explanation for his failure to do anything as a result of receiving this email and letter.<sup>360</sup>

On October 27, 2008, an article was published in the *Elliot Lake Standard* with the headline, “Mall owner adamant about repairing roof.” The article quoted a number of tenants who complained of problems with the constant leaks, including Ms. Croxson, who had said that it was not uncommon to see a tarp strung out over rows of bookshelves and entire wings barred to the public for health and safety reasons. Bob Nazarian was quoted as saying: “These leaks are nothing new. They have been there for the last 18 years. We are working day and night to repair this roof ... I have asked and begged them (contractors) to start (soon).”<sup>361</sup> No contractors had been hired or even spoken to about working on the roof since Fibron’s contract was reneged on by Mr. Nazarian in August. Once again Bob Nazarian spread false news about his plans to fix the roof.

Mr. Ewald testified that he had not read this article. He did recall being in the Mall in the early fall of 2008 and seeing buckets in Zellers to catch the dripping leaks. He saw saturated ceiling tiles and tiles that had been removed. He knew then that there were continuing leak problems, as he had learned on his first day of work. He went onto the roof the following week “to ensure that they were working on trying to rectify the problem.” He was asked if he had conducted any inspections to see if the work that was being done had actually stopped the leaks, and he gave the following evidence:

A. I won’t say I conducted inspections, but I was both up on the mall roof and in the mall on an irregular basis.

Q. We can agree that you can’t tell when you are on the roof whether or not there are leaks below?

A. No, my purpose for being up on the roof parking deck was to see if anything was going on up there.

Q. And can we agree that the Property Standards By-Law requires that the roof be watertight, not that the owner be trying to make it watertight?

A. No, I disagree with that.

Q. You disagree with that? What is your view on that point, sir?

A. Well, if you have a copy of the Property Standards By-Law and it was put up on the screen, I could show you.<sup>362</sup>

Section 5 of the Property Standards By-law was then shown to Mr. Ewald. It reads: "The Roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings."<sup>363</sup> He then gave the following evidence:

Q. And what do you say it means?

A. Well, you can't put an order on someone if they are trying to solve the problem.

Q. Why not?

A. I don't believe it would be appropriate. The order itself wouldn't stand up in Court, I don't believe.

Q. Why not?

A. Because they are already working on it.

Q. But what if what they are doing isn't going to work? What if –

A. I didn't know it was going to work.

Q. You didn't ask, did you? You made no inquiries to determine whether what they were doing was going to work; isn't that correct?

A. That's correct.

Q. And can we agree that the building – the Property Standards By-Law requires that the building be watertight?

A. Or that they be working on maintaining it.

Q. Where does it say that, sir?

A. You just read it.

Q. Is it your evidence that if I owned a building in this City and it leaked and I was up there scraping away and putting Band-Aids on it to try and stop the water from coming in, as long as I was up there doing it, I would be in compliance with the statute, the by-law?

A. As either a Property Standards Officer or a Building Official, I cannot dictate how they do the repairs.

Q. But you can tell them to make it watertight, right?

A. Yes.

Q. And if what they are doing does not make it watertight, you can either have the City do the work itself or you can charge them or both, right?

A. Yes.<sup>364</sup>

Mr. Ewald appears to completely misunderstand the role or powers of a property standards inspector or was being disingenuous about them. It is difficult to understand his failure

- to make inquiries to determine whether the repairs were being carried out;
- to determine if they would be likely to work; or
- to determine the reason for the Notice of Violation being issued requiring an engineering report.

## Bob Nazarian knows that the roof needs fixing but decides not to fix it; instead, he initiates the City land purchase “solution”

### Bob Nazarian decides that a permanent solution is necessary – and that means taking vehicles off the roof

On July 18, 2008 (the day after Mr. Day’s contract was terminated), Mr. Fabris wrote to Mr. Bauthus, enclosing an aerial photograph showing land between the north side of the Mall and city hall “which the Eastwood Mall would like to acquire from the City, in order to provide additional parking.”<sup>365</sup> Bob Nazarian testified that he asked to purchase the land because after Mr. Day had been fired, he realized he needed to do something different with the roof.<sup>366</sup> This request was the first step in what Bob Nazarian characterized as a solution to the problem of the leaking roof – to move the cars off the roof and to park them somewhere else – a process that had not concluded by the time of the Mall collapse some four years later.

Bob Nazarian gave the following evidence about how he felt at the time he started this process in July 2008:

- Q. ... on July 18<sup>th</sup>, you really didn’t know what you were going to do for the long-term, right?
- A. For the long-term, no.
- Q. And what you did was not a long-term solution.
- A. No, we were just covering the damage who was occurred [*sic*].
- Q. And you knew – and you’d known for some time, as you told me, for at least two years, since ‘06, you needed a permanent solution.
- A. May I ... respond to that, please?
- Q. Yes.
- A. I was in a corner, where I could not put a membrane and asphalt on top, due to the weight. I could not put a single membrane because it would not resist the traffic, and so there was virtually no solution, and I was sure that that roof cannot be leak free, if we leave it like that or change just the caulking, as you mentioned.
- So, I was just simply lost. Either I had to put the roof on top or I had to create a new parking.
- Q. And what was your decision?
- A. Both. Anything I could do and anywhere I could get the fund to save that mall.<sup>367</sup>

Bob Nazarian admitted that, by the fall of 2008, he had come to the conclusion that the roof leaks could not be fixed in a way that allowed cars to drive on the roof. On August 21, 2008, Mr. Fabris wrote to Shoppers Drug Mart, a major tenant that had been complaining about the leaks, and told management that, “within the next two weeks, a membrane will be applied to the roof, to effectively seal all leakage.”<sup>368</sup> No such plans had been made and no membrane was ever ordered. On being asked about this letter, Mr. Nazarian testified:

We were in a situation where we were right on a corner. If we were going to put a membrane on top of the roof, what’s the easiest way to seal. But we had two major tenant, like Sobeys and Zellers, that they send us a registered letter ... telling us that if you do that and you stop parking on top of the roof, we will sue you and we will cancel the lease. And if I was not going to put a membrane on top of the roof, I couldn’t do otherwise.

So, this is probably the time whether we knew I had received copy of the membrane that we were supposed to do it, and all the procedure, but I couldn’t implement because I had my major tenants uncomfortable. And I knew that if I put a membrane, they cannot drive on. So I have conclude that we are doomed if we do; we are doomed if we don’t.



So, that's where we draw the conclusion that we have to go with another solution which is parking outside, extra parking, and this was due to the long decision that we made with the members of family, including Levon and my wife and so on.

Q. So you decided that you were not going to put a membrane on?

A. We couldn't.<sup>369</sup>

Mr. Nazarian then testified that he had decided to install a thick membrane which, because of the extra weight, meant that cars could not park on the roof. This solution would take time to negotiate, he said, and the tenants who wanted parking on the roof "had to suffer for a while until we make the parking on the other side."<sup>370</sup> Levon Nazarian confirmed that, as early as 2008, his father had wanted to eliminate the rooftop parking to stop the leaks.<sup>371</sup>

On November 5, 2008, Mr. Fabris wrote again to Ms. Sprague about the proposed purchase of land for a new parking lot, providing a surveyor's sketch for severance purposes.<sup>372</sup> Bob Nazarian testified:

Yes, that's the time when I come to the conclusion that we have to have additional parking so that we can stop parking on top of the roof.<sup>373</sup>

I accept that, by the fall of 2008, Bob Nazarian had decided he would not put in place a permanent solution to fix the roof that would also allow vehicles to park on it. My conclusion is fed, to a great extent, by the clear evidence that Bob Nazarian did nothing with the roof after the summer of 2008 other than continue to maintain it in the same way as, and perhaps less effectively than, it had been maintained since it was first built. He knew that method did not work, yet he continued to do it. I cannot conclude, however, that he actually intended to purchase additional land from the City and spend the money to create a new parking lot. As the evidence showed, and as I will describe below, he spent a great deal of time (but little money) to give the appearance that this choice was his preferred solution to what he recognized to be a serious problem, but he failed to take any concrete steps to bring it about.

**Bob Nazarian did nothing with the roof after the summer of 2008 other than continue to maintain it in the same way as, and perhaps less effectively than, it had been maintained since it was first built. He knew that method did not work, yet he continued to do it.**

### **Bob Nazarian knows that he should investigate the steel to determine its integrity and does not do so**

In September 2008, Bruce Caughill was hired by the Bank of Nova Scotia to determine the efficacy of the joint repair being carried out on the parking deck. His report noted that the roof deck was vulnerable to leaks, both at the control and expansion joints and at the drains. He noted rust on structural steel that showed an ongoing water problem. He noted that the repair process lacked "design and quality control components." It was his opinion that "the effectiveness of the procedures being used by the Landlord to protect the leased premises from water in-flow is doubtful" and the "lack of technical supervision and quality control in the present process is a significant deficiency."<sup>374</sup>

Bob Nazarian testified that he did not see this report. He was then read another conclusion reached by Mr. Caughill in the report and gave the following evidence:

Q. He then wrote: "It is my opinion that water has caused corrosion damage to steel that should be investigated to confirm the integrity of the structure." Do you recall reading that?

A. No, sir, but I do not disagree.

Q. So you agree that there should have been an investigation to confirm the integrity of the structure, because of the corrosion damage to the steel caused by the water?

A. Yes, that's what we did.<sup>375</sup>

Bob Nazarian then testified that he hired engineers, as will be seen, in 2009, when the City ordered him to, and in 2012, when the Royal Bank made it a condition of refinancing. When asked again what he did in 2008 when he agreed there should have been an investigation, he replied: "Not much. We have worked to seal the roof and I think by that time, we didn't have leaks in ... Scotiabank at least."<sup>376</sup>

In any event, it appears that Mr. Nazarian did receive a copy of the report. He agreed that he got a letter from Scotiabank on July 2, 2009, which said:

We have also enclosed a copy of the September 2008 engineering report performed by the firm of Caughill Consulting, which we initially shared with you on September 29, 2008

and

We remain concerned about the statements made by the engineers in Section 6 of that report and would ask you to please address each of the points raised in that Section. In particular, we are especially concerned about whether structural and fireproofing elements, critical to the safety of our customers and employees, may have been compromised, and what steps you have taken to investigate the concerns and resolve any findings.<sup>377</sup>

Mr. Nazarian, however, insisted he had not seen Bruce Caughill's report: "Now it could be that they have sent it to me, but I haven't seen it." He could not explain why he would not have read it if he had received a copy other than to say: "Sir, I did not take it seriously. It was not our engineer and it could be a bias." He agreed that he only took seriously engineering reports done by engineers he paid for.<sup>378</sup>

Levon Nazarian agreed that, if Eastwood had received the engineering report from Bruce Caughill dated September 2008, as suggested by a letter from Scotiabank dated July 2, 2009, it would have been important for the owner to provide him, as sales representative, with a copy. His evidence was that he did not receive a copy of it.<sup>379</sup>

Levon Nazarian testified that he asked only for whatever documents were on hand. He thought he had all the necessary documentation for a potential purchaser. He agreed that it would have been important for a purchaser to know the following information contained in Bruce Caughill's report:

- "It is my opinion that the effectiveness of the procedures being used by the landlord to protect the leased premises from water inflow is doubtful."
- "... [T]hat water has caused corrosion damage to steel that should be investigated to confirm the integrity of the structure."<sup>380</sup>

He also agreed that this document should have been discussed with Mr. Wood before his 2009 report.<sup>381</sup> Yet it was not provided to Mr. Wood at any time.

### **Mayor Hamilton, City councillors, and City staff know that Eastwood has said it wants to reduce parking on the roof to deal with the leaks**

Eastwood's land purchase proposal was discussed at a senior management team meeting at the City on November 19, 2008. The minutes indicate that there was some discussion of whether the Mall had sufficient parking spots to comply with the City's parking by-law.<sup>382</sup> A memo was prepared by Ms. Sprague on December 17, 2008, which stated that, because of amendments to the by-law, the Mall required only 525 parking spots, compared to the 690 it needed when it was built. There were 334 spots on the roof and 379 on the ground level, for a total of 713. Consequently, if parking were stopped on the roof, the Mall would need about 140 more parking spots. Ms. Sprague testified that this memo was prepared with input from the Building Department. It is clear that, by this time, all the senior management of the City, including Mr. Ewald, was aware of Eastwood's request.<sup>383</sup>

Mayor Hamilton was also aware of it. Mr. Bauthus testified that, when someone wanted to buy land from the City, the usual process was for staff to determine whether the City needed the land, to look at issues related to the purchase, and to report to council. With Eastwood's request, Mayor Hamilton involved himself from the beginning. When asked if this interest in the purchase was abnormal, Mr. Bauthus replied: "Quite possibly, yes."<sup>384</sup> This opinion is corroborated by two emails Mayor Hamilton sent to Danielle Vincent, his assistant, and copied to Mr. Bauthus. On September 6, 2008, Mayor Hamilton asked if Ms. Vincent had set up the meeting with Rick Fournier, a local insurance broker, "to discuss the additional parking requested by the mall owner. I just bumped into him." A week later, he sent another email, requesting an update on his request.<sup>385</sup>

On November 25, 2008, Mr. Bauthus met with Mr. Fabris. Notes Mr. Bauthus took during that meeting show that Mr. Fabris told him that Mr. Nazarian wanted to buy the land for parking purposes and that he wanted to reduce the use of roof parking. The notes also include a reference to the Library. Mr. Bauthus testified that Mr. Fabris inquired about the renewal of the lease. He discussed the issues raised at the meeting with Mayor Hamilton.<sup>386</sup>

On November 27, 2008, Mr. Bauthus wrote to Mr. Fabris, telling him that the City needed more information to support the land purchase request. He wrote:

we require some rationale as to why the extra spaces are required and what is proposed to accommodate this request.

...

One of the issues that require addressing will be the number of spaces needed to comply with the zoning bylaw. This would include the challenges related to the rooftop parking and water infiltration ...<sup>387</sup>

Mr. Fabris responded on December 2, writing that much of the ground-level parking space east of the Mall facing Ontario Street was used by merchants and employees, that many City employees improperly parked at the Mall while at work at city hall, and that plans to build new stores in the ground-level parking lot at the far eastern edge of the property would necessitate more parking. His only reference to the roof was as follows:

Furthermore in respect of the roof situation, we are seeking to reduce the weight on the roof by one third and alleviate the wear and tear on the structure. Considerable funds have been spent in the past year to remedy the roof situation and an ongoing recommendation is to reduce traffic in that area, thereby transferring it to the area behind City Hall.<sup>388</sup>



Bob Nazarian testified that this paragraph was put in the letter because he wanted to reduce the number of cars parking on the roof in order to lessen the vibration from the traffic and stop the leaks. It was his evidence that “I come to the conclusion that that roof was not repairable ... [t]he way it was.” He testified that he had concluded that he could fix it by putting a conventional membrane on it.<sup>389</sup>

In a memo written by Ms. Sprague on December 16, 2008, City Council was advised of Eastwood’s request to purchase the land:

The Mall has significant problems with roof maintenance and are attempting to reduce the weight in hopes that this will alleviate leaking problems.<sup>390</sup>

Mayor Hamilton testified that he did not know, at this time, that Eastwood was seeking to reduce the weight on the roof. He claimed not to have read this memo. I find it difficult to accept this evidence, given Mayor Hamilton’s

unusual interest in this land purchase as evidenced by his emails seeking a meeting to discuss it, and Mr. Bauthus’s evidence that he had briefed him about it. The memo bore the title “Request to Purchase – City Land Adjacent to Eastwood Mall – Provision of Additional Parking Areas.”

**By late 2008, all City senior staff, the mayor, and councillors knew that Eastwood wanted to purchase the land to help deal with the leaks. All of them had also been informed that Bob Nazarian was concerned about the weight the roof supported.**

By late 2008, all City senior staff, the mayor, and councillors knew that Eastwood wanted to purchase the land to help deal with the leaks. All of them had also been informed that Bob Nazarian was concerned about the weight the roof supported.

## Notes

- <sup>1</sup> England testimony, May 8, 2013, p. 8499.
- <sup>2</sup> Laroue testimony, May 22, 2013, pp. 10734–7.
- <sup>3</sup> Clinckett testimony, May 14, 2013, pp. 9557–61.
- <sup>4</sup> Exhibit 3759.
- <sup>5</sup> Bob Nazarian testimony, July 24, 2013, p. 17731.
- <sup>6</sup> Exhibit 1070.
- <sup>7</sup> Bob Nazarian testimony, July 24, 2013, p. 17734.
- <sup>8</sup> Clinckett testimony, May 14, 2013, pp. 9561–6.
- <sup>9</sup> Clinckett testimony, May 14, 2013, pp. 9567–8; Bob Nazarian testimony, July 24, 2013, p. 17732.
- <sup>10</sup> Clinckett testimony, May 14, 2013, pp. 9566–7.
- <sup>11</sup> Exhibit 12-27.
- <sup>12</sup> Bob Nazarian testimony, July 24, 2013, p. 17735.
- <sup>13</sup> Exhibit 3950.
- <sup>14</sup> Bob Nazarian testimony, July 24, 2013, pp. 17738–9.
- <sup>15</sup> Exhibit 12-111.
- <sup>16</sup> Exhibit 12-28.
- <sup>17</sup> Cuthbertson testimony, May 1, 2013, p. 7812.
- <sup>18</sup> Exhibit 12-111.
- <sup>19</sup> Bob Nazarian testimony, July 24, 2013, p. 17741.
- <sup>20</sup> Exhibit 12-112.
- <sup>21</sup> Turner testimony, June 4, 2013, p. 12750.
- <sup>22</sup> Exhibit 1261.
- <sup>23</sup> Turner testimony, June 4, 2013, pp. 12818–20.
- <sup>24</sup> England testimony, May 8, 2013, pp. 8485–6.
- <sup>25</sup> Exhibit 12-40, p. 0036.
- <sup>26</sup> Bob Nazarian testimony, July 24, 2013, pp. 17804–7.
- <sup>27</sup> Exhibit 10-46.
- <sup>28</sup> Bob Nazarian testimony, July 24, 2013, pp. 17754–5.
- <sup>29</sup> Exhibit 3411.
- <sup>30</sup> England testimony, May 8, 2013, pp. 8491–5.
- <sup>31</sup> Officer testimony, April 22, 2013, p. 6124.
- <sup>32</sup> Exhibit 161.
- <sup>33</sup> England testimony, May 8, 2013, pp. 8497–8.
- <sup>34</sup> Clouthier testimony, April 23, 2013, pp. 6449–51.
- <sup>35</sup> Exhibit 11-151.
- <sup>36</sup> Exhibit 11-151.
- <sup>37</sup> Exhibit 11-150.
- <sup>38</sup> Hamilton testimony, July 9, 2013, pp. 15072–8.
- <sup>39</sup> Bauthus testimony, May 16, 2013, pp. 10197–8.
- <sup>40</sup> Collett testimony, May 23, 2013, pp. 11121–2.
- <sup>41</sup> Exhibit 11-9.
- <sup>42</sup> Exhibit 11-9.
- <sup>43</sup> Exhibit 11-155.
- <sup>44</sup> Bauthus testimony, May 16, 2013, pp. 10199–212.
- <sup>45</sup> Exhibit 3416.
- <sup>46</sup> Collett testimony, May 23, 2013, pp. 11124–5.
- <sup>47</sup> Exhibit 3760.
- <sup>48</sup> Bauthus testimony, May 16, 2013, pp. 10216–22.
- <sup>49</sup> Bauthus testimony, May 16, 2013, pp. 10222–3.
- <sup>50</sup> Exhibit 3760; see also Exhibit 3417.
- <sup>51</sup> Bauthus testimony, May 16, 2013, pp. 10224–8.
- <sup>52</sup> Bauthus testimony, May 16, 2013, pp. 10228–9.
- <sup>53</sup> Bauthus testimony, May 16, 2013, p. 10231.
- <sup>54</sup> Bob Nazarian testimony, July 24, 2013, pp. 17813–6.
- <sup>55</sup> Exhibit 3418.
- <sup>56</sup> Exhibit 11-157.
- <sup>57</sup> Hamilton testimony, July 9, 2013, pp. 15083, 15088.
- <sup>58</sup> Collett testimony, May 23, 2013, pp. 1134–6.
- <sup>59</sup> Bauthus testimony, May 16, 2013, pp. 10232–6.
- <sup>60</sup> Exhibit 11-26.
- <sup>61</sup> Hamilton testimony, July 9, 2013, pp. 15092–3.
- <sup>62</sup> Bauthus testimony, May 16, 2013, p. 10256.
- <sup>63</sup> Exhibit 1547.
- <sup>64</sup> Bauthus testimony, May 16, 2013, pp. 10260–2.
- <sup>65</sup> Exhibit 1547.
- <sup>66</sup> Bauthus testimony, May 16, 2013, p. 10265.
- <sup>67</sup> Hamilton testimony, July 9, 2013, p. 15109.
- <sup>68</sup> Hamilton testimony, July 9, 2013, p. 15110.
- <sup>69</sup> Exhibit 3508, p. 141.
- <sup>70</sup> Exhibit 11-161.
- <sup>71</sup> Exhibit 11-163.
- <sup>72</sup> Exhibit 11-162.
- <sup>73</sup> Exhibit 11-160.
- <sup>74</sup> Bauthus testimony, May 16, 2013, p. 10253.
- <sup>75</sup> Clouthier testimony, April 23, 2013, pp. 6440–1.
- <sup>76</sup> Hamilton testimony, July 9, 2013, pp. 15100–6.
- <sup>77</sup> Bauthus testimony, May 16, 2013, p. 10199.
- <sup>78</sup> Exhibit 13-90, pp. 003–004; McCulloch testimony, June 13, 2013, pp. 14388–9.
- <sup>79</sup> McCulloch testimony, June 13, 2013, pp. 14357–62.
- <sup>80</sup> McCulloch testimony, June 13, 2013, p. 14351.
- <sup>81</sup> Exhibit 13-12.
- <sup>82</sup> Bob Nazarian testimony, July 24, 2013, pp. 17786–8.
- <sup>83</sup> Cuthbertson testimony, May 1, 2013, pp. 7823–7; Exhibit 12-40, p. 0030.
- <sup>84</sup> Cuthbertson testimony, May 1, 2013, pp. 7829–32.
- <sup>85</sup> Cuthbertson testimony, May 1, 2013, p. 7828.
- <sup>86</sup> Cuthbertson testimony, May 1, 2013, p. 7833; Exhibit 12-36.
- <sup>87</sup> Exhibit 12-38.
- <sup>88</sup> Cuthbertson testimony, May 1, 2013, p. 7836.
- <sup>89</sup> Exhibit 12-38.
- <sup>90</sup> Exhibit 92.
- <sup>91</sup> Clinckett testimony, May 14, 2013, pp. 9569–77.
- <sup>92</sup> Exhibit 92.
- <sup>93</sup> Clinckett testimony, May 14, 2013, pp. 9581–7.
- <sup>94</sup> Exhibit 51.
- <sup>95</sup> NORR testimony, May 29, 2013, pp. 12406–7.
- <sup>96</sup> Exhibit 65.
- <sup>97</sup> Bob Nazarian testimony, July 24, 2013, pp. 17816–17.
- <sup>98</sup> Exhibit 228, p. 002.
- <sup>99</sup> Exhibit 1066, p. 066; Bob Nazarian testimony, July 24, 2013, pp. 17817–18.
- <sup>100</sup> Exhibit 1135.
- <sup>101</sup> Clinckett testimony, May 14, 2013, p. 9594.
- <sup>102</sup> Bob Nazarian testimony, July 24, 2013, pp. 17821–5.
- <sup>103</sup> Bob Nazarian testimony, July 24, 2013, pp. 17819–29.
- <sup>104</sup> England testimony, May 8, 2013, pp. 8517–19.
- <sup>105</sup> Bob Nazarian testimony, July 24, 2013, pp. 17825–6.
- <sup>106</sup> Clinckett testimony, May 14, 2013, pp. 9626–7.
- <sup>107</sup> Exhibit 3975.
- <sup>108</sup> Bob Nazarian testimony, July 24, 2013, pp. 17831–5.
- <sup>109</sup> Exhibit 1387.
- <sup>110</sup> Bob Nazarian testimony, July 24, 2013, pp. 17844–5.
- <sup>111</sup> Exhibit 1387.
- <sup>112</sup> Exhibit 1387.

- <sup>113</sup> Holford testimony, May 9, 2013, pp. 8872–4.
- <sup>114</sup> Holford testimony, May 9, 2013, pp. 8880–1.
- <sup>115</sup> Holford testimony, May 9, 2013, pp. 8890–4.
- <sup>116</sup> Turner testimony, June 4, 2013, p. 12736.
- <sup>117</sup> Exhibit 802; Bob Nazarian testimony, July 24, 2013, pp. 17836–8.
- <sup>118</sup> Holford testimony, May 9, 2013, p. 8894.
- <sup>119</sup> Holford testimony, May 9, 2013, pp. 8896–8904.
- <sup>120</sup> Holford testimony, May 9, 2013, pp. 8907–10.
- <sup>121</sup> Holford testimony, May 9, 2013, pp. 8911–14.
- <sup>122</sup> Elliott testimony, August 1, 2013, pp. 19540–6, 19550–1.
- <sup>123</sup> Exhibit 723.
- <sup>124</sup> Exhibit 723.
- <sup>125</sup> Bob Nazarian testimony, July 24, 2013, pp. 17852–4.
- <sup>126</sup> Elliott testimony, August 1, 2013, pp. 19553–6.
- <sup>127</sup> Elliott testimony, August 1, 2013, pp. 19556–8.
- <sup>128</sup> Elliott testimony, August 1, 2013, pp. 19558–61; Exhibit 723.
- <sup>129</sup> Bob Nazarian testimony, July 24, 2013, pp. 17870–1.
- <sup>130</sup> Bob Nazarian testimony, July 24, 2013, p. 17869.
- <sup>131</sup> Holford testimony, May 9, 2013, p. 8890.
- <sup>132</sup> Elliott testimony, May 9, 2013, pp. 19563–4.
- <sup>133</sup> Elliott testimony, May 9, 2013, pp. 19561–5.
- <sup>134</sup> Bob Nazarian testimony, July 24, 2013, pp. 17865–7.
- <sup>135</sup> Bob Nazarian testimony, July 24, 2013, pp. 17863–6.
- <sup>136</sup> Exhibit 723.
- <sup>137</sup> Elliott testimony, August 1, 2013, p. 19556.
- <sup>138</sup> Bob Nazarian testimony, July 24, 2013, pp. 17856–7.
- <sup>139</sup> Bauthus testimony, May 16, 2013, pp. 10269–71.
- <sup>140</sup> Clouthier testimony, April 23, 2013, p. 6451.
- <sup>141</sup> Allard testimony, April 29, 2013, pp. 7207–9.
- <sup>142</sup> Exhibit 177.
- <sup>143</sup> Clouthier testimony, April 23, 2013, p. 6428.
- <sup>144</sup> Clouthier testimony, April 23, 2013, pp. 6451–2.
- <sup>145</sup> Holford testimony, May 9, 2013, p. 8906.
- <sup>146</sup> Holford testimony, May 9, 2013, pp. 8934–7.
- <sup>147</sup> Holford testimony, May 9, 2013, pp. 8913–8.
- <sup>148</sup> Holford testimony, May 9, 2013, p. 8923.▲
- <sup>149</sup> Bob Nazarian testimony, July 24, 2013, p. 17847.
- <sup>150</sup> Holford testimony, May 10, 2013, pp. 9041–2.
- <sup>151</sup> Holford testimony, May 10, 2013, pp. 9042–6.
- <sup>152</sup> Holford testimony, May 9, 2013, pp. 8923–5.
- <sup>153</sup> Exhibit 1341.
- <sup>154</sup> Cuthbertson testimony, May 1, 2013, pp. 7838–9.
- <sup>155</sup> Exhibit 12-41.
- <sup>156</sup> Sennett testimony, May 14, 2013, pp. 9647–62.
- <sup>157</sup> Exhibit 6209.
- <sup>158</sup> Sennett testimony, May 14, 2013, pp. 9663–5.
- <sup>159</sup> Bob Nazarian testimony, July 24, 2013, pp. 17893–4.
- <sup>160</sup> Exhibit 748.
- <sup>161</sup> Exhibit 3978.
- <sup>162</sup> Sennett testimony, May 14, 2013, pp. 9674–7.
- <sup>163</sup> Bob Nazarian testimony, July 24, 2013, pp. 17898–900.
- <sup>164</sup> Exhibit 12-41.
- <sup>165</sup> Exhibit 748.
- <sup>166</sup> Exhibit 744.
- <sup>167</sup> Bob Nazarian testimony, July 24, 2013, p. 17886.
- <sup>168</sup> Day testimony, May 9, 2013, pp. 8655–8.
- <sup>169</sup> Day testimony, May 9, 2013, p. 8660.
- <sup>170</sup> Bob Nazarian testimony, July 24, 2013, p. 17916.
- <sup>171</sup> Fabris testimony, July 10, 2013, p. 15527; Bob Nazarian testimony, July 24, 2013, pp. 17916–17; Day testimony, May 9, 2013, p. 8661.
- <sup>172</sup> Day testimony, May 9, 2013, p. 8662.
- <sup>173</sup> Exhibit 4363.
- <sup>174</sup> Day testimony, May 9, 2013, p. 8664.
- <sup>175</sup> Exhibit 4363, pp. 348–51; Day testimony, May 9, 2013, pp. 8664–7.
- <sup>176</sup> Exhibit 657.
- <sup>177</sup> Exhibit 657, p. 280.
- <sup>178</sup> Fabris testimony, July 10, 2013, pp. 15537–8.
- <sup>179</sup> Fabris testimony, July 10, 2013, p. 15536.
- <sup>180</sup> Exhibit 656.
- <sup>181</sup> Day testimony, May 9, 2013, p. 8679.
- <sup>182</sup> Exhibit 51, p. 2.
- <sup>183</sup> Day testimony, May 9, 2013, pp. 8679–82.
- <sup>184</sup> Bob Nazarian testimony, July 24, 2013, pp. 17918–19.
- <sup>185</sup> Bob Nazarian testimony, July 24, 2013, pp. 17920–1.
- <sup>186</sup> Exhibit 1482.
- <sup>187</sup> Bob Nazarian testimony, July 24, 2013, pp. 17927–8.
- <sup>188</sup> Fabris testimony, July 10, 2013, p. 15541.
- <sup>189</sup> Clouthier testimony, April 23, 2013, pp. 6453–5; Exhibit 172, pp. 89–93.
- <sup>190</sup> Exhibit 172, p. 94.
- <sup>191</sup> Exhibit 3985.
- <sup>192</sup> Exhibit 1494.
- <sup>193</sup> Bob Nazarian testimony, July 24, 2013, pp. 17934–5.
- <sup>194</sup> Bob Nazarian testimony, July 24, 2013, p. 17935.
- <sup>195</sup> Bob Nazarian testimony, July 24, 2013, p. 17937.
- <sup>196</sup> Bob Nazarian testimony, July 24, 2013, pp. 17936–7.
- <sup>197</sup> Fabris testimony, July 10, 2013, pp. 15544, 15549–50.
- <sup>198</sup> England testimony, May 8, 2013, p. 8546.
- <sup>199</sup> Exhibit 1558.
- <sup>200</sup> Bob Nazarian testimony, July 24, 2013, p. 17946.
- <sup>201</sup> Exhibit 3765.
- <sup>202</sup> Bob Nazarian testimony, July 24, 2013, pp. 17928–30.
- <sup>203</sup> Bob Nazarian testimony, July 25, 2013, pp. 18121–2.
- <sup>204</sup> Exhibit 3765, pp. 301–2.
- <sup>205</sup> Exhibit 3765, p. 303.
- <sup>206</sup> Day testimony, May 9, 2013, pp. 8729–33.
- <sup>207</sup> Bob Nazarian testimony, July 24, 2013, pp. 17953–4.
- <sup>208</sup> Sennett testimony, May 14, 2013, pp. 9678–9.
- <sup>209</sup> Exhibit 6203.
- <sup>210</sup> Exhibit 6204.
- <sup>211</sup> Exhibit 6205.
- <sup>212</sup> Bob Nazarian testimony, July 25, 2013, pp. 18147–8.
- <sup>213</sup> Bob Nazarian testimony, July 24, 2013, pp. 17952–3.
- <sup>214</sup> Day testimony, May 9, 2013, p. 8730.
- <sup>215</sup> Day testimony, May 9, 2013, pp. 8734–5.
- <sup>216</sup> Bob Nazarian testimony, July 24, 2013, p. 17939; (as to date) Day testimony, May 9, 2013, pp. 8738–9; Exhibit 656, p. 269.
- <sup>217</sup> Day testimony, May 9, 2013, p. 8738.
- <sup>218</sup> Ewald testimony, May 24, 2013, pp. 11428–31.
- <sup>219</sup> Ewald testimony, May 24, 2013, pp. 11434–5.
- <sup>220</sup> Ewald testimony, May 24, 2013, p. 11449.
- <sup>221</sup> Ewald testimony, May 24, 2013, pp. 11450–6.
- <sup>222</sup> Ewald testimony, May 24, 2013, p. 11432.
- <sup>223</sup> Ewald testimony, May 24, 2013, pp. 11462–3; Exhibit 172, p. 94.
- <sup>224</sup> Exhibit 3422.
- <sup>225</sup> Ewald testimony, May 24, 2013, pp. 1146–5.
- <sup>226</sup> Exhibit 172, p. 96.



- <sup>227</sup> Ewald testimony, May 24, 2013, p. 11469.
- <sup>228</sup> Ewald testimony, May 24, 2013, pp. 11467–9.
- <sup>229</sup> Ewald testimony, May 24, 2013, pp. 11473–6.
- <sup>230</sup> Ewald testimony, May 24, 2013, pp. 11478–80.
- <sup>231</sup> Exhibit 11-168.
- <sup>232</sup> *Building Code Act, 1992*, SO 1992, c 23, s 14.
- <sup>233</sup> Day testimony, May 9, 2013, pp. 8746–7, 8846.
- <sup>234</sup> Day testimony, May 9, 2013, pp. 8747–8.
- <sup>235</sup> Exhibit 3993, p. 233.
- <sup>236</sup> Exhibit 3993, p. 235.
- <sup>237</sup> Bob Nazarian testimony, July 24, 2013, pp. 17965–6.
- <sup>238</sup> Cuthbertson testimony, May 1, 2013, p. 7841.
- <sup>239</sup> Exhibit 4048.
- <sup>240</sup> Cuthbertson testimony, May 1, 2013, pp. 7845–6.
- <sup>241</sup> Laroue testimony, May 22, 2013, pp. 10745–6.
- <sup>242</sup> Bob Nazarian testimony, July 24, 2013, pp. 17986, 17990.
- <sup>243</sup> Exhibit 1340.
- <sup>244</sup> Exhibit 804.
- <sup>245</sup> Clinckett testimony, May 14, 2013, pp. 9604–12.
- <sup>246</sup> Exhibit 95, p. 4.
- <sup>247</sup> Exhibit 1095.
- <sup>248</sup> Bob Nazarian testimony, July 24, 2013, p. 17980.
- <sup>249</sup> Holford testimony, May 10, 2013, p. 9045.
- <sup>250</sup> Bob Nazarian testimony, July 25, 2013, pp. 18107–9.
- <sup>251</sup> Fabris testimony, July 10, 2013, pp. 15560–2; Bob Nazarian testimony, July 24, 2013, pp. 17997–8; Exhibit 1495.
- <sup>252</sup> Exhibit 1495, Fabris testimony, July 10, 2013, pp. 15568–9; Day testimony, May 9, 2013, p. 8767.
- <sup>253</sup> Day testimony, May 9, 2013, p. 8769; Exhibit 1495.
- <sup>254</sup> Day testimony, May 9, 2013, pp. 8770–4; Exhibit 3765, p. 304.
- <sup>255</sup> Day testimony, May 9, 2013, p. 8777.
- <sup>256</sup> Fabris testimony, July 10, 2013, pp. 15571–2.
- <sup>257</sup> England testimony, May 8, 2013, pp. 8549–50; Laroue testimony, May 22, 2013, p. 10748.
- <sup>258</sup> Laroue testimony, May 22, 2013, p. 10748.
- <sup>259</sup> Exhibit 1338; Fabris testimony, July 10, 2103, p. 15585.
- <sup>260</sup> Laroue testimony, May 22, 2013, p. 10753.
- <sup>261</sup> Bob Nazarian testimony, July 24, 2013, pp. 18006–7.
- <sup>262</sup> Bob Nazarian testimony, July 24, 2013, p. 18004.
- <sup>263</sup> Yakimov testimony, May 15, 2013, pp. 9830–4; Exhibit 4280.
- <sup>264</sup> Yakimov testimony, May 15, 2013, pp. 9839–40.
- <sup>265</sup> Exhibit 226.
- <sup>266</sup> Yakimov testimony, May 15, 2013, pp. 9939–40.
- <sup>267</sup> Bob Nazarian testimony, July 24, 2013, pp. 17971–7.
- <sup>268</sup> Elliott testimony, August 1, 2013, pp. 19567–9.
- <sup>269</sup> Exhibit 725.
- <sup>270</sup> Exhibit 1391, p. 2216.
- <sup>271</sup> Bob Nazarian testimony, July 24, 2013, pp. 17980–5.
- <sup>272</sup> Fabris testimony, July 10, 2103, p. 15574.
- <sup>273</sup> Exhibit 1391, p. 2214.
- <sup>274</sup> Exhibit 1391.
- <sup>275</sup> Exhibit 1391.
- <sup>276</sup> Bob Nazarian testimony, July 24, 2013, p. 18014.
- <sup>277</sup> Bob Nazarian testimony, July 25, 2013, pp. 18031–2.
- <sup>278</sup> Bob Nazarian testimony, July 24, 2013, p. 18017.
- <sup>279</sup> Bob Nazarian testimony, July 24, 2013, pp. 18018–23; July 25, 2013, pp. 18033–5.
- <sup>280</sup> Exhibit 1393.
- <sup>281</sup> Exhibit 5842.
- <sup>282</sup> Holford testimony, May 9, 2013, p. 8931.
- <sup>283</sup> Holford testimony, May 9, 2013, pp. 8943–4; Bob Nazarian testimony, July 25, 2013, p. 18036.
- <sup>284</sup> Holford testimony, May 9, 2013, pp. 8937–41.
- <sup>285</sup> Bob Nazarian testimony, July 25, 2013, pp. 18037–8.
- <sup>286</sup> Exhibit 1097.
- <sup>287</sup> Exhibit 1097.
- <sup>288</sup> Holford testimony, May 9, 2013, pp. 8970–1.
- <sup>289</sup> Holford testimony, May 9, 2013, pp. 8971–2.
- <sup>290</sup> Exhibit 1100; Holford testimony, May 9, 2013, p. 8981.
- <sup>291</sup> Exhibit 1608.
- <sup>292</sup> Exhibits 1479 and 4314; Holford testimony, May 9, 2013, pp. 8988–99; May 10, 2013, pp. 9025–40.
- <sup>293</sup> Exhibit 3770.
- <sup>294</sup> Exhibit 5397.
- <sup>295</sup> Exhibits 3770, 5398, and 1105.
- <sup>296</sup> Bob Nazarian testimony, July 25, 2013, pp. 18059–60.
- <sup>297</sup> Exhibit 1105.
- <sup>298</sup> Exhibit 1105.
- <sup>299</sup> Exhibit 1103.
- <sup>300</sup> Sennet testimony, May 14, 2013, pp. 9719–20.
- <sup>301</sup> Bob Nazarian testimony, July 25, 2013, pp. 18067–10.
- <sup>302</sup> Exhibit 1104.
- <sup>303</sup> Bob Nazarian testimony, July 25, 2013, p. 18066.
- <sup>304</sup> Bob Nazarian testimony, July 25, 2013, p. 18070.
- <sup>305</sup> Bob Nazarian testimony, July 25, 2013, p. 18062.
- <sup>306</sup> Exhibit 1105.
- <sup>307</sup> Bob Nazarian testimony, July 25, 2013, p. 18064.
- <sup>308</sup> Exhibit 5393.
- <sup>309</sup> Levon Nazarian testimony, July 15, 2013, pp. 16239–40; Sennett testimony, May 14, 2013, p. 9707.
- <sup>310</sup> Bob Nazarian testimony, July 25, 2013, pp. 18071–5.
- <sup>311</sup> Exhibit 3773.
- <sup>312</sup> Exhibit 3773, p. 0023.
- <sup>313</sup> Levon Nazarian testimony, July 15, 2013, pp. 16238, 16250–2.
- <sup>314</sup> Levon Nazarian testimony, July 15, 2013, pp. 16257–66.
- <sup>315</sup> Sennett testimony, May 14, 2013, pp. 9713–15.
- <sup>316</sup> Bob Nazarian testimony, July 25, 2013, pp. 18083–91.
- <sup>317</sup> Exhibits 5842 and 3771; Bob Nazarian testimony, July 25, 2013, pp. 18123–5.
- <sup>318</sup> Exhibits 657, 3771, and 724.
- <sup>319</sup> Exhibit 226.
- <sup>320</sup> Exhibit 226, p. 2087.
- <sup>321</sup> Exhibit 226, pp. 011–020.
- <sup>322</sup> Fabris testimony, July 11, 2013, pp. 15633–49.
- <sup>323</sup> Bob Nazarian testimony, July 25, 2013, pp. 18171, 18176.
- <sup>324</sup> Exhibit 725.
- <sup>325</sup> Fabris testimony, July 11, 2013, pp. 15649–55.
- <sup>326</sup> Elliott testimony, August 1, 2013, p. 19580.
- <sup>327</sup> Fabris testimony, July 11, 2013, pp. 15654–8.
- <sup>328</sup> Bob Nazarian testimony, July 25, 2013, pp. 18179–80.
- <sup>329</sup> Bob Nazarian testimony, July 25, 2013, pp. 18080–1.
- <sup>330</sup> Exhibit 3775.
- <sup>331</sup> Exhibit 6206.
- <sup>332</sup> Sennett testimony, May 14, 2013, pp. 9708–10.
- <sup>333</sup> Bob Nazarian testimony, July 25, 2013, p. 18184.
- <sup>334</sup> Exhibit 6207.
- <sup>335</sup> Exhibit 6204, p. 0003.
- <sup>336</sup> Bob Nazarian testimony, July 25, 2013, pp. 18185–6.
- <sup>337</sup> Exhibit 5425, Exhibit 6208.
- <sup>338</sup> Bob Nazarian testimony, July 25, 2013, p. 18180.

- <sup>339</sup> Bauthus testimony, May 16, 2013, p. 10293.
- <sup>340</sup> Exhibit 13-101.
- <sup>341</sup> Exhibit 13-112.
- <sup>342</sup> McCulloch testimony, June 13, 2103, pp. 14409–18.
- <sup>343</sup> Exhibit 12-70.
- <sup>344</sup> Laroue testimony, May 22, 2013, pp. 10773–7.
- <sup>345</sup> Exhibit 1298.
- <sup>346</sup> Bauthus testimony, May 16, 2013, pp. 10293–5.
- <sup>347</sup> Exhibit 11-171.
- <sup>348</sup> Bauthus testimony, May 16, 2013, p. 10296.
- <sup>349</sup> Exhibit 11-2.
- <sup>350</sup> Hamilton testimony, July 9, 2013, pp. 15131–4.
- <sup>351</sup> Exhibit 11-171, p. 5018.
- <sup>352</sup> Hamilton testimony, July 9, 2013, pp. 15135–6.
- <sup>353</sup> Bauthus testimony, May 16, 2013, pp. 10303–5.
- <sup>354</sup> Bauthus testimony, May 16, 2013, p. 10305; Ewald testimony, May 24, 2013, pp. 11511–12.
- <sup>355</sup> Exhibit 4023, p. 02.
- <sup>356</sup> Hamilton testimony, July 9, 2013, p. 15140.
- <sup>357</sup> Hamilton testimony, July 9, 2013, pp. 15141–6.
- <sup>358</sup> Exhibits 986 and 11-23.
- <sup>359</sup> Exhibits 11-23 and 986.
- <sup>360</sup> Ewald testimony, May 24, 2013, pp. 11505–9.
- <sup>361</sup> Exhibit 10-10.
- <sup>362</sup> Ewald testimony, May 24, 2013, pp. 11499–501.
- <sup>363</sup> Exhibit 6-7.
- <sup>364</sup> Ewald testimony, May 24, 2012, pp. 11501–3.
- <sup>365</sup> Exhibit 349.
- <sup>366</sup> Bob Nazarian testimony, July 24, 2013, p. 18009.
- <sup>367</sup> Bob Nazarian testimony, July 24, 2013, pp. 18007–8.
- <sup>368</sup> Exhibit 1488, pp. 005–6.
- <sup>369</sup> Bob Nazarian testimony, July 25, 2013, pp. 18156–8.
- <sup>370</sup> Bob Nazarian testimony, July 25, 2013, p. 18159.
- <sup>371</sup> Levon Nazarian testimony, July 15, 2013, pp. 16347–9.
- <sup>372</sup> Exhibit 1043.
- <sup>373</sup> Bob Nazarian testimony, July 26, 2013, p. 18572.
- <sup>374</sup> Exhibit 13-118.
- <sup>375</sup> Bob Nazarian testimony, July 25, 2013, p. 18195.
- <sup>376</sup> Bob Nazarian testimony, July 25, 2013, pp. 18195–7.
- <sup>377</sup> Exhibit 5838.
- <sup>378</sup> Bob Nazarian testimony, July 25, 2013, pp. 18188–90, 18247–53.
- <sup>379</sup> Levon Nazarian testimony, July 18, 2013, pp. 17243–4.
- <sup>380</sup> Levon Nazarian testimony, July 18, 2013, pp. 17247–51.
- <sup>381</sup> Levon Nazarian testimony, July 18, 2013, pp. 17253–4; Exhibit 5838.
- <sup>382</sup> Exhibit 928.
- <sup>383</sup> Exhibit 341; Bauthus testimony, May 16, 2013, pp. 10343–7; Sprague testimony, July 12, 2013, pp. 16062–5.
- <sup>384</sup> Bauthus testimony, May 16, 2013, p. 10341.
- <sup>385</sup> Exhibit 3435.
- <sup>386</sup> Bauthus testimony, May 16, 2013, pp. 10338–43 and 10349–50; Exhibit 3447.
- <sup>387</sup> Exhibit 3450.
- <sup>388</sup> Exhibit 1330.
- <sup>389</sup> Bob Nazarian testimony, July 25, 2013, pp. 18211–13.
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## **2009: The leaks continue, Eastwood does nothing to stop them, and the City misses opportunities to force the owner to fix them**

The year 2009 was one of contradictions for Elliot Lake. It would see the City, on the one hand, renew the Library lease with Eastwood against the wishes of the Library and force it to remain in its leak-plagued location. On the other hand, it issued an Order to Remedy against Eastwood over structural concerns and the ongoing leaks. The City issued the order in reaction to its discovery of the 2006 Notice of Violation. The reaction was short-lived. The City would conclude, based on a deficient report from engineer Robert Wood and without proof, that the roof had been fixed and the leaks stopped despite no new repair methods being undertaken at the Mall.

Although 2009 was a less eventful year for Bob Nazarian, he would nonetheless continue to mislead the City, the Royal Bank, and Mall tenants by saying that the leaks were fixed. Scotiabank, one of the Mall's anchor tenants, would be the only one to take a stand against Eastwood by withholding its rent as a result of the damage caused by the leaks.

## **January–March: The City Council responds to the land purchase request, and the Library lease saga continues**

### **January–February: Land purchase – the City is told Eastwood wants to purchase land to stop the leaks, but makes no decision on the request**

On January 13, 2009, Lesley Sprague, the City clerk, responded to Antoine-René Fabris's letter of December 2, 2008, advising him that Eastwood's request to purchase City land would be on the agenda for the next scheduled meeting of the By-law and Planning Committee, on February 2, 2009. This committee was responsible for reviewing requests to purchase land from the City.<sup>1</sup>

Bob Nazarian and Mr. Fabris attended the February 2, 2009, meeting on behalf of Eastwood. The minutes of the meeting record the following:

Mr. Fabris and Mr. Nazarian from the Eastwood Mall spoke to the committee about a proposal to purchase the property behind the Fire Hall and Ambulance centre for the purposes of creating additional parking. Items discussed included drainage issues and reduction of green space. Further discussion to take place after report prepared for next regular meeting.<sup>2</sup>

Bob Nazarian testified that he told the committee he wanted to buy this land because he had concluded that he needed it to "make additional parking and eventually reduce the leak." He claimed he informed the committee he had decided that, if he did not do so, he could not fix the leaks. Mr. Nazarian was adamant that he had told the committee he wanted to reduce or eliminate the parking on top of the roof and substitute parking in the back of the Mall.<sup>3</sup>

However, Councillor Al Collett, who was at the meeting, testified that Mr. Fabris and Bob Nazarian reported to the committee that they had some concerns about the rooftop of the Mall at the time: there were some drainage problems, and Eastwood wanted to purchase land close to the Mall for parking to alleviate some of the weight from the parking on the roof.<sup>4</sup> Councillor Collett testified that Mr. Fabris and Mr. Nazarian did mention that one

of the reasons to alleviate the weight on the roof was to stop the leaks in the Mall. He stated that they did not specifically talk about structural measures of any kind. It was his evidence that, given the concern about the additional weight on the roof, he raised the possibility of Eastwood using the parking space at the far end of the parking lot which was used at that time for dumping snow. Councillor Collett testified that in his opinion, if the City was to sell the land behind the fire hall to Eastwood, it would be a considerable distance from that parking lot to the Mall entrance, and it would be easier to open up the parking lot at the far end of the Mall because it was not currently used.<sup>5</sup>

Ms. Sprague, who was also at the meeting, testified that she believed Bob Nazarian and Mr. Fabris advised the committee that the proposed purchase was intended to stop the leaks. She confirmed that the committee did not make a decision and there was no resulting resolution. The committee requested a report from staff before making a decision.<sup>6</sup>

As I described above, when council was informed in 2008 of Eastwood's request to purchase the land, it became aware that the leaking was of such significance that Bob Nazarian thought it was important to put an end to parking on the roof. Despite its importance to the safety of the Mall, this request for purchase of municipal land by Eastwood would follow a long and slow process of more than two years. Eastwood never did purchase the land.

## **January: Scotiabank seeks to recover from Eastwood the costs it incurred as a result of the leaks**

On December 28, 2008, approximately 20 ceiling tiles were damaged throughout Scotiabank as a result of water infiltration. The initial cleanup was performed by the branch's manager and her spouse. The following day, the Mall maintenance personnel replaced the wet ceiling tiles, but the wet flooring and drywall remained. The bank manager noted a musty odour in the bank.<sup>7</sup>

A few days later, on January 6, 2009, Scotiabank requested, through Henrieth Laroue, the Mall manager, that Eastwood "rectify right away so that mold doesn't start. Please be advised that if this isn't rectified by Monday January 12th, 2009, than [sic] we will have to contact ServiceMaster to complete the work at your expenses since this issue is caused by your ongoing roof leaks."<sup>8</sup>

The situation was never rectified. A week later, on January 14, 2009, Scotiabank wrote another email to Ms. Laroue and Bob Nazarian:

Per the email below, we still have not heard from your office nor has your staff been to the branch to remove the wet material [the wet ceiling tiles, the wet drywall and wet carpeting<sup>9</sup>] that is present in our Branch due to the roof leaks.

In order to keep mould from growing within our branch it is imperative that wet material doesn't remain for any period of time. As per the email below, your staff hasn't completed the removal of the wet material, therefore we will proceed with hiring Service Master to complete this work. We will then invoice your firm for reimbursement for the costs to remove the wet material provided by Service Master.<sup>10</sup>

On February 6, 2009, Scotiabank sent a letter to Bob Nazarian seeking to recover from Eastwood the costs and expenses of \$113,889.72 as a result of the "continual roof leaks" at the Mall. These charges included environmental testing (\$21,201), mould remediation (\$64,981), and several emergency cleanups.<sup>11</sup>



Bob Nazarian admitted having negotiated a lease condition three years earlier which specifically provided that the landlord would pay for all reasonable costs resulting from the leaks and that, if the landlord did not pay, the tenant could deduct the amount from its rent. He testified, however, that Scotiabank should not have deducted the costs from the rent and should have looked to its own insurer for compensation:

They had the insurance in their lease, specifying that every tenant has to have their own insurance, and in this case, that tenant could have gone to their insurance and say, "We have damaged so much due to the water leak", and collect from the insurance, but no, they exercised to collect from the landlord, which is me, and therefore, I didn't have this much money to pay them out of nowhere. They were not paying rent anyway.<sup>12</sup>

Bob Nazarian eventually agreed with Commission counsel that he was obligated to pay these costs under the lease agreement with Scotiabank but that they could have been submitted to its insurer instead. Despite being told that the evidence was to the contrary, Mr. Nazarian insisted that, as of February 2009, Scotiabank had already been withholding rent "for so many months."<sup>13</sup> That was not so. As I describe below, the bank stopped rent payments almost six months later, on July 28, 2009.

Judy McCulloch, the branch's customer service manager, testified that the Mall maintenance personnel did not remove the wet material and, consequently, Scotiabank called in ServiceMaster.<sup>14</sup> ServiceMaster took down several ceiling tiles and pulled up some carpet. Part of the wall was torn out and fans installed.<sup>15</sup> On February 17, 2009, Scotiabank advised Bob Nazarian and Ms. Laroue of the steps it had taken and the action required to prevent mould:

With leaks, it is very important to dry the wet materials or remove them within 48 hours as mould can set in, which then will cost more as Environmental tests would then be required to ensure Staff health. We have proceeded to remove these materials and dry other materials to minimize your costs. We will forward these costs for your attention once received.

Please advise as soon as possible a schedule as to when we can expect all leaks to be completed and when you will be reinstating our branch?<sup>16</sup>

On February 23, 2009, Mr. Fabris replied to the email on behalf of Eastwood, stating:

We have been following the roof situation closely, and note that in the past the branch has been excessive in the removal of materials. If you are to remove any materials, please claim from your insurance.

As far as we are aware the leaks have been dealt with. Please advise if more leaks develop as this is a continuing repair process. I note no mold has been detected as per previous fear.<sup>17</sup>

Ms. McCulloch disagreed that the removal of damaged material was "excessive." It was her evidence that the amount of mould found required the material's removal. She testified that she did not believe that Mr. Fabris or Bob Nazarian ever visited the bank following the work performed in August 2008.<sup>18</sup> I question how they could come to the conclusion that the material removed from the premises was excessive. Ms. McCulloch also testified that, contrary to the allegations of Mr. Fabris, the leaks had not been dealt with.<sup>19</sup> The other evidence before me, from other tenants who were also suffering from leaks at the same time, supports her evidence, which I accept. Indeed, on February 12, 2009, Zellers reported that it had 59 tiles with water leaking on them.<sup>20</sup>

Bob Nazarian never paid Scotiabank's costs, despite having contracted to do so in 2006. Scotiabank consequently withheld its rent. The leaks persisted, and the bank eventually moved out.

## March: Library lease – Eastwood misleads the City into thinking that the Retirement Living space is available

Mr. Fabris was involved, on behalf of Eastwood, with the negotiations with the City for the Library's lease renewal. He testified that, because his instructions were to start the negotiations early – so as not to be stuck at the last minute trying to execute a lease with this major tenant – he approached the City almost a year before the lease was due to expire. It was his evidence that Eastwood did not initially know whether council wanted the Library to stay in the Mall, but he learned from Fred Bauthus, the chief administrative officer, that the City was thinking of building a multiplex (with a pool, arena, and the Library) for which it was hoping to receive federal funding. Mr. Fabris testified that as a result of this possibility, the negotiations for the renewal of the Library lease went into a "holding pattern."<sup>21</sup>

On March 5, 2009, Mr. Bauthus, Mr. Fabris, Ms. Morin, and Ms. Laroue met to discuss the issue. Mr. Bauthus's notes of the meeting show that there was discussion about a possible five-year lease with a five-year option. Mr. Bauthus testified that the note "deferral of April 1/09" referred to the lease requirement to provide notice six months in advance of the expiration of the lease if the Library wanted to renew. He further testified that Mr. Fabris had advised him that he would not hold the Library to this requirement. Mr. Bauthus confirmed that they discussed moving the Library to the old Retirement Living offices, which were leak-free because they were on the ground floor. Mr. Bauthus testified that, although there had been no formal confirmation that this space was available for the Library, the City was left to believe that it was.<sup>22</sup>

On March 9, 2009, Mr. Bauthus wrote to Bob Nazarian, copying Suzanne Morin (chief librarian), Katherine Croxson (chair of the Library board), Ms. Laroue, and Mayor Hamilton. He explained that the City was considering continuing a lease arrangement with Eastwood for space to accommodate the Library and would appreciate receiving a proposal for space as follows:

- Term of 5 years with 5 year option
- Approximately 9,000 square feet
- Space to include the space currently occupied by Retirement Living
- Cost and description of fitting out the proposed space<sup>23</sup>

Mayor Hamilton agreed that this communication was the sort of formal letter that would start the negotiation process. According to him, council was still operating on the same premise that Mr. Bauthus had expressed to Ms. Croxson in April 2008 – that council would not decide on whether the Library would remain in the Mall until it knew if the leaks had been fixed. He admitted that Mr. Bauthus's letter was inconsistent with that position because it was proposing lease terms before the City knew if the leaks had been fixed.<sup>24</sup>

On March 12, 2009, Mr. Fabris wrote Bob Nazarian, stating:

- I met with Henri McCleary [sic] and Fred Bauthus on March 5th, 2009, in regards to the library. The library board expressed their intentions to renew their lease for a 5 year period, with option to renew for 5 more.
- I believe that the infrastructure money has not yet been received from the Multi-Plex project in Elliot Lake; however they are adamant that they wish to move out of the spot that they are in.
- We did not disclose to them that the Retirement Living space had been tentatively leased to Public Works Canada. I believe that a further meeting would be required.*<sup>25</sup> [Emphasis added.]

Bob Nazarian would continue to mislead the City, both on the issue of the leaks and the availability of the Retirement Living space. He negotiated in what can be described only as bad faith in an attempt to keep the Library as a tenant.

Mr. Bauthus testified that Mr. Fabris's letter accurately reflected the fact that the Library was seeking an alternative location and wanted to move out of the existing space because of the leaks.<sup>26</sup> Mr. Bauthus agreed that Ms. Morin was the promoter of this idea and that, as far as the Library was concerned, it wanted nothing to do with staying where it was.<sup>27</sup>

Bob Nazarian would continue to mislead the City, both on the issue of the leaks and the availability of the Retirement Living space. He negotiated in what can be described only as bad faith in an attempt to keep the Library as a tenant. The efforts of Ms. Morin would prove to be fruitless, faced with a City Council willing to ignore the pleas of the Library about the deplorable conditions and the potential structural problems.

### March: Land purchase – City Council is advised again that Eastwood wants to purchase City land to stop the leaks

Mr. Bauthus testified that, following the February 2009 meeting of the By-law and Planning Committee, the sale of the land was "in limbo." A meeting of the committee should have taken place in early March but, as Mr. Bauthus testified, no report was prepared for that meeting, contrary to the request noted in the minutes of the February 2 meeting. Mr. Bauthus testified that, after the February meeting, he had asked Bob Nazarian to provide him with some engineering information about the land's grade separation and drainage onto City property, but nothing was ever provided.<sup>28</sup> Mr. Bauthus testified that he also had concerns about whether Bob Nazarian would actually follow through on the project.<sup>29</sup>

On March 18, 2009, Ms. Laroue, then general manager of Eastwood, sent a letter to Mr. Bauthus with respect to the proposed parking for the Mall. She indicated that Eastwood wished to proceed with the additional parking and inquired about the status of the request. She asked to be advised as soon as possible so that Eastwood could start taking the necessary steps.<sup>30</sup>

Six days later, on March 24, 2009, Mr. Bauthus prepared a report "provid[ing] Council with information respecting a request by Eastwood Mall to purchase land adjacent to the mall to provide additional parking capacity."<sup>31</sup> In his report, Mr. Bauthus wrote that "[t]here may be some merit to acquiring the additional land in order to create additional parking which in turn would reduce some of the pressure created by the parking on the rooftop area."<sup>32</sup> He explained that this statement meant that the additional parking would remove pressure caused by the vehicles on the roof and decrease the wear and tear.<sup>33</sup> He could not explain why he omitted from the report Mr. Fabris's explanation (in his letter of December 2, 2008<sup>34</sup>) that one-third of the weight on the roof would be reduced and that this reduction would help with the leaks.<sup>35</sup> He testified:

Q. Sir, can you tell me, why did you not say anything in this report about the leaks?

A. I can't relate to that outside of looking at the benefit to the municipality in terms of looking at the improvement that I had indicated. And I guess I would have left that the ... would meet the needs of the mall owner.

Q. But the mall owner told you, he gave you ... five reasons. The first reason you'd already discounted and that was that a lot of people used the mall parking lot to park when they're going to the other stores on Ontario Street. And then the very next reason was to help with the leaks. So that was what the mall owner had told you and you knew that the leaks were a serious problem, right?

A. Yes, sir.



Q. In fact. The leaks were so serious the library wanted out?

A. Yes, sir.

Q. So I'm just trying to understand why, when you were writing this letter to the Council about this proposal to purchase the land, which had as ... one of its major purposes dealing with the leaks, you didn't tell them.

A. I can't answer that right at this time.<sup>36</sup>

In light of the events of the summer of 2008 leading up to the tenants' meeting in September 2008, it would seem to me that the City should have been eager for the Mall owner to find a solution to the leaks that had been plaguing the Mall for almost 30 years. The inclusion of this information in the report would have been highly relevant. In any event, it appears that members of council were aware of the relationship between Mr. Nazarian's attempt to stop the leaks and his request to the purchase the land.

Mr. Collett testified that everyone assumed that the reference in Mr. Bauthus's report to the reduction of the pressure on the rooftop was related to the leaks. It was his evidence that, when he received the report, he thought that it was a step in the right direction for Bob Nazarian: "finally ... he was actually doing something to alleviate the problem." He was in favour of the City selling the land to Mr. Nazarian.<sup>37</sup>

Mayor Hamilton testified that when he read Mr. Bauthus's report, he understood that the reference to reducing some of the pressure created by the parking on the rooftop area related to the weight of the cars or the number of cars driving back and forth. He understood there was a relationship between that traffic and the weight of the cars and the leaks. He admitted knowing by then, if not earlier, that the Mall owner's desire to purchase the land was an attempt to reduce the leaks by reducing the number of cars on the roof.<sup>38</sup>

Ms. Sprague testified that her only involvement with this report was to assist Mr. Bauthus with the wording of the recommendation to council. She said this issue was not within her area of responsibility despite the fact that land matters, land sale, and acquisition were normally part of it. It was her evidence that it was a fairly important issue in which the chief administrative officer was directly involved. City Council viewed it as important because the Mall was its major retailer.<sup>39</sup> I find it odd that, during her testimony, Ms. Sprague was quick to transfer responsibility for this matter to the chief administrative officer. As I describe below, it would become quite apparent later on that Ms. Sprague, who would go on to write several reports on this matter, was the City staff person responsible for this issue.

In addition to his duties as chief building official, Bruce Ewald was secretary of the By-law and Planning Committee.<sup>40</sup> He read Mr. Bauthus's report<sup>41</sup> and testified that Mr. Bauthus's reference in it to reducing some of the pressure created by the parking on the rooftop area did not raise questions in his mind about whether there was a problem in terms of the weight on the roof. Unlike Mayor Hamilton and Mr. Collett, Mr. Ewald testified that he interpreted "pressure" as referring to the constant movement of vehicles driving on the roof – the traffic, and not the weight.<sup>42</sup> He testified that it "was obvious to me from the day I came up for my very first interview" why they wanted to reduce the pressure from the roof. He testified that it "was the most stupidest design for a parking lot I had ever seen" because "[y]ou don't put parking on a roof" and because "[v]ehicles driving overtop of a roof top are just going to cause problems. That is just based on common sense, in my opinion." He explained that it was obvious to him that the constant movement of cars would prevent the seal from staying intact and would cause leaking: "It was a problem design ... And it would be prone to leaks."<sup>43</sup> He admitted knowing that where there are leaks in a steel-supported building, there is a potential for rust. Nevertheless, he took no steps to

It "was the most stupidest design for a parking lot I had ever seen."

– Bruce Ewald

determine whether leakage, which he considered to be an obvious consequence of the parking deck, had actually occurred:

Q. And you also knew that if there were leaks in a steel supported building, there was a potential for rust, particularly when the leaks were from drips from cars with salt?

A. Most definitely. But again, the information I had only suggested that that roof had been leaking since 2006.

Q. But you knew, sir, from what you have just told us, that as you put it, it was a stupid design and the building was 30 years old?

A. Yes.

Q. So you knew that at least there was a serious risk that it had salt-rich water dripping through it for 30 years?

A. No, I didn't know that.

Q. But you knew it was a potential because it was –

A. Oh, definitely.

Q. – because it was, in your view, a stupid idea, right?

A. Yeah, it was a dumb idea, but I mean, like anything else, with proper maintenance ... they could have alleviated that, and as I say, the only information I had suggested that that building had only been leaking since 2006.

Q. But you took no steps to determine whether what you say was obvious to you from the get-go had in fact occurred, whether or not there had been leaks for 30 years with the resulting damage?

A. No.<sup>44</sup>

During his testimony, I probed Mr. Ewald on his claim that he was aware that the Mall had been leaking only since 2006. Mr. Ewald agreed with my suggestion that he actually did not have any information on when the leaks started, but simply assumed that it had been leaking since 2006 because there was nothing in the Building Department file prior to the 2006 Notice of Violation, despite the bad design.<sup>45</sup> Surprisingly, as I discuss below, Mr. Ewald claimed that he became aware of the 2006 Notice of Violation only in September 2009. His claim that, when he read the Bauthus report, he thought the leaks had started in 2006 can be described only as nonsense.

On March 26, 2009, Mr. Bauthus provided Mr. Fabris with a copy of his March 24 report and advised him that the request from Eastwood to purchase City land would be dealt with by the By-law and Planning Committee on April 6, 2009. Mr. Fabris was informed that the meeting was public and that he could attend to speak to the matter should he wish to do so.<sup>46</sup>

### **March: Eastwood informs the City that, contrary to earlier indications, the Library cannot use the Retirement Living space**

On March 25, 2009, following the meeting of March 5 and Mr. Bauthus's letter of March 19, Mr. Fabris sent a letter to Mr. Bauthus informing him that the space formerly occupied by Retirement Living had been leased out to a government agency at almost double the rate currently being paid by the Library. He went on to say that the only available space for the Library was the area it was currently occupying, as well as a portion of the old Reitmans store.<sup>47</sup> Mr. Bauthus testified that he was not pleased with this correspondence, given that Mr. Fabris had not indicated until then that the space the Library was interested in, and had specifically asked about, had been rented out. Mr. Bauthus thought Mr. Fabris was not negotiating in good faith.<sup>48</sup> This lack of trust affected the City's confidence in Eastwood, particularly because, as Mr. Bauthus saw it, the City had always been forthright

with Bob Nazarian, even mentioning its plan for the multiplex and the funding it was expecting. Mr. Bauthus also agreed that he did not trust Mr. Nazarian because of Eastwood's misleading statement in the fall of 2008 that the leaks had been fixed.<sup>49</sup>

On March 27, 2009, Mr. Bauthus sent a memo to the mayor and City Council, providing them with an update. He wrote that Mr. Fabris had advised him that the space then occupied by Retirement Living had been leased to a government agency and, accordingly, would not be available for use by the Library. He further stated that this information did not come as a surprise and that it offered a very real example of how Bob Nazarian chose to do business with a premier tenant of his Mall. In his memo, Mr. Bauthus also outlined a chronology of events leading up to the letter, including meetings that were held between him and Mr. Fabris and/or Ms. Laroue in March, October, and November 2008 and in March 2009. In anticipation that his dealings with Mr. Nazarian would not run smoothly to a desired mutual agreement, he had asked staff to look at alternative arrangements. They had reviewed the possibility of using the Collins Hall (a municipally owned property) and determined that the Library could be located in that space with no floor-load issues. Mr. Bauthus identified the next step as determining feasibility.<sup>50</sup> In sum, Mr. Bauthus informed council that he believed Mr. Nazarian could not be trusted and that the Retirement Living space was unavailable, but that the Collins Hall and the multiplex were possibilities.<sup>51</sup>

Councillor Collett testified that when he received Mr. Bauthus's memo, he was not surprised to learn that Bob Nazarian had apparently leased the property to another occupant. He did not think that Mr. Nazarian ever had any intention of offering the space to the Library – it was just another game that Mr. Nazarian played. Councillor Collett was opposed to the use of the Collins Hall for a number of reasons involving its history and vocation. Rather, he was in favour of the Library being located in the multiplex.<sup>52</sup> The fact remains that a safe, leak-free environment existed at Collins Hall.

## **April–August: Eastwood and the City respond to the land appraisal, inadequate inspections, and manipulations of the Library lease**

### **April: City supports Eastwood's plan to purchase the land**

#### **By-Law and Planning Committee recommends to Council that the land be declared surplus and an appraisal be obtained**

On April 6, 2009, a meeting of the By-law and Planning Committee was held. Mr. Fabris and a delegation from Eastwood addressed the committee about its wish to purchase the adjoining land. The committee received Mr. Bauthus's report of March 24, 2009, and adopted a resolution (seconded by Mayor Hamilton) recommending that (1) the land sought to be purchased by Eastwood be declared surplus to the need of the municipality; (2) an appraisal of the value of the land be obtained; and (3) an agreement be negotiated with Eastwood to set the condition for the proposed sale of the land.<sup>53</sup>

Although present at the meeting, neither Ms. Sprague nor Mr. Bauthus recalled much about it.<sup>54</sup> Mr. Bauthus explained that the committee's endorsement of the land sale still had to be approved by council.<sup>55</sup> He testified that he would have spoken to the mayor about this requirement before the proposed purchase was discussed at the meeting. He would have discussed the matter with the mayor in broad terms and told him that selling this land would address some of the Mall's issues and that the sale was something for council to consider. Mr. Bauthus could not say whether he would have mentioned to the mayor the issue of the leaks or the reduction in weight. He did not advise the mayor whether it was a good or bad idea and simply left it to him to make the decision.<sup>56</sup>



### **City Council passes resolutions declaring the land surplus and requesting an appraisal**

On April 14, 2009, during a closed session, City Council discussed Eastwood's request for the purchase of City property.<sup>57</sup> The minutes noted: "Discussion on Eastwood mall owner as he wants to purchase City property for parking lot. This will solve a drainage problem. Staff are directed to declare land as surplus and get appraisal."<sup>58</sup> Council adopted the recommendations of the By-law and Planning Committee that the land be declared surplus and an appraisal be obtained. An appraisal was required by a City by-law in order to sell City land.<sup>59</sup>

Mr. Bauthus agreed that the drainage problem caused by water occasionally running from the access road from Hillside Drive down to the land behind the fire hall had existed since the Mall was built in 1979.<sup>60</sup> The minutes of the closed session did not reflect the fact that the purchase was to help deal with the leaks or reduce the weight on the roof. Mr. Bauthus testified that he would have told members of council during the closed session that Bob Nazarian was interested in purchasing the land in order to assist with fixing the leaks, but that he did not tell them that the reasons also included Eastwood's desire to reduce the weight on the roof.<sup>61</sup>

Ms. Sprague testified she did not believe there was any discussion about the fact that the land was being bought to reduce and alleviate the leaks, since no such discussion was reflected in the minutes.<sup>62</sup> Councillor Collett, however, testified that Mr. Bauthus would have reiterated the information he provided to the By-law and Planning Committee about why Eastwood wanted to purchase the land: (1) that Eastwood wanted additional parking; and (2) it wanted to reduce the weight on the roof to alleviate the leaks.<sup>63</sup> In addition, Mayor Hamilton testified that, although he could not advise whether it was known to other members that the leaks were the reason for the purchase of the land, some councillors (whom he could not identify) knew that the purchase was an attempt to deal with the leaks.<sup>64</sup>

Both Councillor Collett and Mayor Hamilton testified that council was in favour of selling the land to Eastwood provided that an agreement could be reached and subsequently approved by council following the appraisal. Councillor Collett testified that the unanimous view of council was to adopt the recommendation of the committee. Mayor Hamilton agreed that "City Council was not standing in Mr. Nazarian's way of buying the land."<sup>65</sup>

### **The City declares the land surplus and retains an appraiser**

On April 16, 2009, the City posted a notice declaring the land sought to be purchased by Eastwood surplus to the needs of the municipality.<sup>66</sup> The same day, Ms. Sprague sent a letter to Mr. Fabris, with a copy to Ms. Laroue and Bob Nazarian, advising that City Council had declared the land surplus and required an appraisal of its value.<sup>67</sup> Ms. Sprague testified that she was responsible for preparing the notice and advising Mr. Fabris of the resolution of council.<sup>68</sup> It is clear that, contrary to what Ms. Sprague claimed before the Commission, she was heavily involved in this matter.

The following day, on April 17, 2009, Ms. Sprague retained John Shamess, a professional appraiser in Elliot Lake, requesting his opinion on the land's value.<sup>69</sup>

## April: Bob Nazarian misleads the Royal Bank in an effort to obtain more funds

While City Council was considering the request by Eastwood to purchase the land behind the fire hall, Bob Nazarian was trying to keep his mortgagee happy in an effort to obtain additional funds from the bank for the purchase of the land.

### Bob Nazarian alters his rent rolls to suit his financial needs

On April 6, 2009, the Canadian Mortgage Rating Service Ltd. advised Bob Nazarian that it had been retained by the Royal Bank to conduct a physical inspection of the Mall on April 16, 2009. A request was also made for the current rent roll. Mr. Nazarian forwarded the email to Ms. Laroue as a “reminder only.”<sup>70</sup>

Ms. Laroue testified that the inspections conducted for the Royal Bank took place annually.<sup>71</sup> She explained that the “bank inspections were always of utmost importance” for Bob Nazarian.<sup>72</sup> She would accompany the inspectors around the Mall and be friendly with them.<sup>73</sup> Ms. Laroue also testified that Bob Nazarian would instruct the Mall staff to make the Mall look as good as possible in advance of an inspection (either by the bank for mortgage purposes or by the City inspectors). This cleanup would include changing ceiling tiles that had watermarks or stains on them to camouflage the fact that there had been leaks in that area and moving the tarps and hoses that were used to collect water from the leaking ceiling above the ceiling tiles so they were no longer visible to the naked eye.<sup>74</sup>

Ms. Laroue also testified that before the bank inspection, Bob Nazarian would have her “re-create the rent roll” to make the Mall’s financial condition appear more favourable. Ms. Laroue explained that she would “[t]ake out ones [tenants] that hadn’t paid and show that they had paid and not have it look so dismal. It became a separate entity on the computer.”<sup>75</sup> Ms. Laroue continued her testimony as follows:

Q. Well, just wait a second. Did you in fact do that?

A. Yes.

Q. Did you ...a raise any objection with Mr. Nazarian about that request?

A. Yes, I believe I told him it was illegal.

Q. But notwithstanding that, you went ahead and did it?

A. Yeah, he told me it was none of their business the different things that we had on there, because the original rent roll that we sent – that we kept track of every day listed every single little thing, and ... he wanted ... the bottom number to reflect more favourably. And that I kept as a side note always ... “Bob’s rent roll” is what I called it on the computer.

So we kept our regular track, you know, what I mean? Like say for March’s rent roll, we kept a regular track, but that was a separate one that I e-mailed to Bob. He did whatever he did with it and it was never used on my end.<sup>76</sup>

Ms. Laroue testified that she was asked to “fix up” the rent rolls a couple of times a year. She explained that this modification would affect two things: (1) the income that was shown for the Mall; and/or (2) the vacancy rate of the Mall. When Ms. Laroue “fixed up” the rent rolls, it was often to reflect the fact that a tenant who had “in reality” left the Mall was still a tenant and paying rent. In other circumstances, Bob Nazarian would ask that a tenant not be shown on the rent roll. For example, when Mr. Nazarian applied for a rebate from the City, he wanted to show a higher vacancy rate.<sup>77</sup> Ms. Laroue testified that the “fixed-up” rent roll would often reflect a

difference from reality of \$20,000 to \$50,000 per month. On a yearly basis, the difference could be \$250,000 to \$500,000. Ms. Laroue testified that she sent the “fixed” rent rolls only to Bob and Irene Nazarian, Levon Nazarian, or Alexander Sennett, the Mall’s security consultant.<sup>78</sup>

Ms. Laroue testified that the rent roll found at Exhibits 4506 and 4506A are examples of two different versions of the rent roll for the same period – with Exhibit 4506 having been altered and 4506A showing the actual financial condition of the Mall. Ms. Laroue testified that, on Exhibit 4506, the line item showing the Algo Inn paying rent of \$25,804.71 to the Mall was not accurate. At that time the Hotel was not paying rent because Eastwood also owned it. As a result, the figure showing a total rental income of \$178,569.19 would, according to Ms. Laroue, reflect a “fixed-up” version of the rent roll.<sup>79</sup>

A similar deceptive financial manoeuvre (with the Algo Inn shown as providing income to Eastwood) is also reflected in the rent rolls at Exhibits 2356 and 2356A for May 2010, with Exhibit 2356 showing the true rent and Exhibit 2356A having been altered.<sup>80</sup>

Ms. Laroue testified that Bob Nazarian asked her to send to him the “re-created” rent roll for the April 2009 inspection. She did not personally provide the documents to the bank and was therefore not able to confirm which version the bank actually received.<sup>81</sup>

It appears that the inspection did take place on April 16, 2009.<sup>82</sup> Ms. Laroue testified that, when the inspector arrived on site, she did not shepherd him around in his inspection. He was free to look anywhere he chose.<sup>83</sup>

Bob Nazarian presented a different version of events to me. He testified that he was simply asking Ms. Laroue to provide the necessary assistance to the inspector. He denied having asked Ms. Laroue to change the rent rolls in any way in preparation for the inspection. He stated that Ms. Laroue’s testimony was not true and that he “would never do that.”<sup>84</sup>

Documents speak louder than words. I cannot accept Mr. Nazarian’s evidence, particularly in light of my earlier findings with respect to the significant unexplained discrepancies in his financial statements.

### **Bob Nazarian seeks to obtain the release of the reserve funds**

One of the terms of the mortgage obtained by Eastwood provided for the payment of monies by Eastwood into reserve funds held by the bank. The reserve funds consisted of realty tax (monthly) \$33,500; lease reserve (immediate) \$150,000; and lease reserve (monthly) \$5,000 (over 30 months).<sup>85</sup> Bob Nazarian testified that, by 2009, \$300,000 had been accumulated in these funds in addition to interest.<sup>86</sup> The terms of the lease reserve provided the conditions under which disbursement of the funds could occur, including that the lease reserve was to be used for reasonable costs associated with the leasing of vacant space and could not be disbursed if Eastwood was in monetary default.<sup>87</sup>

At the same time as the City was considering Eastwood’s request for the purchase of City land, Bob Nazarian testified he was seeking the release of all or part of the lease reserve in order to purchase the City land and create the new parking space. Mr. Nazarian tried to submit the necessary information to obtain the release of the funds. At that time, he had no firm quotations or estimates for what it would cost to construct a parking lot on the City land. According to him, he needed the land before he could hire the contractors.<sup>88</sup>

Bob Nazarian would never obtain the release of the reserve fund. As I have indicated, however, he did not need this money to purchase the land. He had the financial means to do so.



## May: The relationship between the City and Eastwood becomes strained

### Eastwood seeks to buy the City land for a low price

On May 8, 2009, Mr. Fabris sent a letter to Bob Nazarian advising him that he had met the previous day with Mr. Bauthus and Ms. Sprague and had discussed with them the Library lease and the purchase of the City land. Mr. Fabris advised:

With respect to the property I have enclosed a draft agreement of purchase and sale. I liked your comments on the agreement. There is to be 180 day due diligence period on this matter. The appraisal is not yet ready; the final agreement will be prepared once the appraisal is set. I doubt the appraisal will be much more than a few thousand dollars.

However, during the due diligence period there will be extensive engineering work to be done and a site plan will have to be prepared. I note also that the rezoning will have to be performed on the property.<sup>89</sup>

Bob Nazarian testified that Mr. Fabris told him surplus lands were sold at approximately \$1,000 or \$2,000 per acre. Mr. Nazarian also understood that the items in the second paragraph would be additional steps he had to take in order to acquire the property.<sup>90</sup> Mr. Nazarian never took those steps. As I conclude below, he was not prepared to expend the funds to proceed with the project, let alone pay fair market value for the land.

### “Bad feelings” between the City and Eastwood over the leaks

In his May 8, 2009, letter, Mr. Fabris also updated Bob Nazarian on the issue of the Library lease and the City’s reaction to the unavailability of the Retirement Living space:

In respect on [sic] the library, Mr. Bauthus expresses disappointment that the Nordev offices were not available. He indicated that there were tremendous bad feelings, with respect to the leaks. I responded that the leaks were a large part of responsibility in Retirement Living and their failure to maintain the roof.

As such we have indicated that we have taken an aggressive maintenance program, and that we would address the leaks accordingly. He indicated that we would have an answer prior to the end of June, as to the library’s intentions.<sup>91</sup>

Mr. Bauthus confirmed that he had negative feelings when he learned the Retirement Living offices were not available to the Library – especially as the Library continued to experience leaks. Mr. Bauthus also confirmed that during the meeting, Mr. Fabris had tried to lay the blame for the leaks on the previous owner, Retirement Living.<sup>92</sup>

Mr. Fabris testified that about this time, he discussed with Bob Nazarian the need to stop the leaks.<sup>93</sup> He further explained that the “aggressive maintenance program”<sup>94</sup> was a reference to re-caulking of all the cracks in the roof, which, according to Mr. Fabris, continued into 2009. His understanding was that three-quarters of the roof had been repaired in 2008, and the maintenance went on until late fall. He also claimed that this work recommenced in 2009, along with repairs to damage that occurred during the 2008–9 winter.<sup>95</sup>

If this work was done, it had no effect. In 2009, neither the leaks nor the complaints of numerous tenants, including the Library, Scotiabank, and Zellers, ever stopped.

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## May: More mould found at Scotiabank, but Bob Nazarian still questions the veracity of the inspector's findings

In April 2009, the staff of Scotiabank raised further health concerns with respect to water leaking into the premises.<sup>96</sup> As a result, on May 11, 2009, Pinchin Environmental performed another mould and indoor air-quality assessment following up on the investigations conducted in 2008. Bank staff reported to Pinchin the following:

Water continues to leak through the ceiling of the teller area, waiting area, open office area and kitchen each time it rains. Buckets are placed in locations where some of the water leaks have repeatedly occurred. The affected lay-in ceiling tiles are replaced after every heavy rainfall.

...

A musty odour is noticed by branch staff and is most prominent in the morning.<sup>97</sup>

In its interim report of May 14, 2009 (later confirmed in its final report dated June 16, 2009<sup>98</sup>), Pinchin noted suspect mould growth in the photocopy area and adjoining corridor, office no. 4, the open office area, the teller area, and the storage room (see figure 1.10.1). Water staining was also noted in several locations. The recommendations made included repairing the source of leaks from the roof and removing and disposing of the wet material (in this case, the wet carpet).<sup>99</sup> Ms. McCulloch testified that this report was shared with Mall management and with Bob Nazarian.<sup>100</sup> She stated that Scotiabank undertook the recommended remediation work and that the carpet was removed throughout the bank (a fact corroborated by Pinchin in its final report).<sup>101</sup> Eventually, tiles were installed.<sup>102</sup>

Bob Nazarian admitted that he saw the May 14, 2009, Pinchin report. He claimed that he asked Robert Wood immediately to check the bank and the adjacent stores to make sure that there actually was mould and that it was not just “presumptions.” He agreed that Pinchin was a firm of environmental engineers but was concerned because Scotiabank had hired it. According to Mr. Nazarian, the person who hires the engineer can make a “big difference” with respect to results. He stated:

When an engineer is working for you is giving you the truth to you. When it's influenced by the bank workers, it could have a different result. So, to make sure, we have asked Mr. Bob Wood to come and check, not only Scotiabank, but adjacent, just for our own information to see if there is a mould or not or if there is, to what extent. And that's our right.<sup>103</sup>



**Figure 1.10.1** Conditions in the manager's office and behind the tellers at the Scotiabank branch, May 2009

Source Exhibits 5115 and 5119

Bob Nazarian testified that he did not believe Pinchin was providing accurate information to the bank because he was under the assumption that Scotiabank was “creating the expense, not to pay the rent.”<sup>104</sup>

When asked what he did in 2009 to deal with the leaks, Bob Nazarian asserted that the leaks were much “better” in 2009, that Mr. Bauthus was very happy with the Library, and that the leaks had almost stopped in Scotiabank. He agreed, nonetheless, that in the summer of 2008 the bank had removed half the drywall, exposing the studs, and, because it did not want to enclose the walls until the leaks were dealt with, it had left it in that condition until it moved out in 2011. He claimed he was told the leakage situation was much better, although he acknowledged there was no permanent fix because that would have required eliminating the cars and putting a membrane on the roof.<sup>105</sup>

Again, I find the evidence of Bob Nazarian totally unreliable considering that, only a few days before he received the Pinchin report, Mr. Fabris had advised him that there were bad feelings at the City toward the Mall because of the leaks. Furthermore, the evidence before me shows that the leaks in fact never stopped at Scotiabank. I am also perplexed by the fact that Mr. Nazarian actually questioned the accuracy of the Pinchin findings without any justification.

### **May: The land sought to be purchased by Eastwood is appraised at a value higher than what Bob Nazarian expected**

On May 17, 2009, the City received Mr. Shames's appraisal of the land. Mr. Shames concluded that the most likely estimate was \$55,000 to \$60,000.<sup>106</sup> The *Municipal Act* required a fair market value appraisal for the disposition of municipally owned property.<sup>107</sup> Ms. Sprague testified that she was not surprised by the estimated value of the land. She expected it to come within that range.<sup>108</sup>

### **April–June: Robert Wood is hired by Eastwood and does not deem it important to his mandate to consider the 1998 Halsall report**

On April 8, 2009, Robert Wood was retained by Eastwood to provide an as-built drawing and an engineering report outlining the structural condition of the tenant space that had previously been occupied by Retirement Living. The engineering report had been requested by Service Canada, which intended to lease the premises.<sup>109</sup> This assignment would be the first of many given to Mr. Wood by Eastwood, leading up to his inspection in May 2012, mere weeks before the collapse.

### **Mr. Wood's training and experience**

Mr. Wood obtained a bachelor of science in civil engineering from the University of London at King's College in 1969. He immigrated to Canada in 1973 and was licensed as a professional engineer in Ontario in January 1974. He was hired by the Foundation Company of Canada in Toronto, where he worked on various projects, including some in Hamilton related to the steel industry. After four months, he was transferred to Sault Ste. Marie, where he assisted in the design of a blast furnace at the Algoma Steel Company building. In 1986, he started to work with M.R. Wright and Associates. He later became principal owner and remained at that firm until his retirement in 2012.<sup>110</sup>

Mr. Wood testified that he conducted condition assessments of large hotels and conference centres throughout Canada. He indicated that he travelled the country inspecting buildings for real estate investment trusts (REITs). He carried out condition assessments of the components of hotels, including the mechanical, electrical, and structural elements, in order to identify any problems with the buildings. Most of the buildings were similar in size to the Mall, or larger. Mr. Wood also inspected hockey arenas during his time with M.R. Wright; they



required routine inspections because damp and humid conditions caused corrosion problems to their structures. Mr. Wood testified that he had previously condemned an arena in the Town of Spanish, in the Algoma District, and he ordered that several others be reinforced so they could continue being used. He stated that he also had experience inspecting bridges, including bi-annual inspections of many bridges throughout townships in the Algoma District and beyond. Mr. Wood had acted as interim building official for the Townships of Wicksteed and Michipicoten and for the City of Sault Ste. Marie. He testified that he reviewed many collapsed structures, including the Station Mall, in his capacity as a building inspector for the City of Sault Ste. Marie.<sup>111</sup>

In his testimony, Mr. Wood explained that most of his experience in relation to corrosion, before his work at the Mall, was with rust and corrosion in industrial settings. He did not have previous experience dealing with corrosion in a mall like the Algo Mall. He testified that he did not expect the supporting steel structure inside a mall to have been affected by rust and corrosion.<sup>112</sup>

Before working for Eastwood to prepare his October 2009 report, Mr. Wood had never worked on a rooftop parking deck with public space underneath. He testified that he worked on many parking decks and in many malls, but that, to his knowledge, there are no other malls in Northern Ontario, other than the City Centre in Sudbury, that have parking over occupied space.<sup>113</sup>

### **Mr. Wood is advised of leaks under the roof deck**

On June 3, 2009, Mr. Wood provided a report to Eastwood about the former Retirement Living space, which stated:

The structure within the tenant space was observed to be sound and no visual deficiencies were observed ... Conversations with staff indicated that there had been no structural or water problems in this area. It is our understanding that some issues exist in the areas of the building that are located underneath the roof top parking area.<sup>114</sup>

Mr. Wood agreed that at the time of preparing his June 2009 report he had been told about leaks in the areas underneath the parking deck by Ms. Laroue, but he said that he did not look at those areas.<sup>115</sup> He testified that, because the building was 30 years old, he was not surprised there were leaks in certain areas of the Mall. He explained that most roofs have a life expectancy of less than 30 years. Mr. Wood explained that he was not told how many leaks there were, or where they were. He claimed he was not told how long the Mall had been leaking.<sup>116</sup>

### **Mr. Wood is provided with the 1998 Halsall report but does not read it closely or consider it**

Mr. Wood testified that when he performed the structural review of the former Retirement Living space, he asked Eastwood if it had any drawings. He was shown the structural and architectural drawings, and he believed that, at that time, Ms. Laroue provided him with a four- or five-page 1998 Halsall report.<sup>117</sup> He confirmed that the Halsall report he saw was the one prepared by Halsall in November 1998 as part of the Nicholls Yallowega Bélanger building condition assessment commissioned by Retirement Living.<sup>118</sup>

He confirmed that he probably read the parking structure section of the November 1998 Halsall report. With respect to the reference to the corrosion of the structural steel beams and columns, Mr. Wood testified:

Q. All right. And you'll see that in the first part of this discussion and the third paragraph, it refers to the corrosion of structural steel beams and columns indicating past leaking of the deck. See that there?

A. I can read that, yes.

Q. And that's 10 years before or, actually, more than 10 years before your visit in 2009.

A. Correct.

Q. And so when you read that, you realized that this was a long-standing issue?

A. I didn't realize that. I took this as information. I was looking at the space that was occupied by Retirement Living and I took this for information and filed it more than look at [it] – I wasn't being asked to look at that area of the mall at that time.<sup>119</sup>

He also testified that he did not specifically recall reading the recommendation in the 1998 Halsall report that the condition of the beam and bracing connections should be inspected. At the time he was not looking at the parking deck but only at the Retirement Living space.<sup>120</sup>

Even though the issue considered by Halsall in 1998 was similar to what Mr. Wood was mandated to consider in the fall of 2009 and again in 2012, he did not deem it necessary to review his files and consider the information he had in his possession, including the 1998 Halsall report.

## **May–June: Pinchin conducts a visual inspection and concludes that the Mall is in “satisfactory condition”**

### **Pinchin is hired by the Royal Bank and Midland Loan Services to conduct a Building Condition Assessment of the Mall**

In May / June 2009,<sup>121</sup> Pinchin was retained by the Royal Bank, the administrator of Eastwood's mortgage on the Mall, and Midland Loan Services, a provider of loan servicing, to carry out a Building Condition Assessment. The assessment, carried out in accordance with an approved work plan, consisted of an inspection by Majid Milani-Nia, an engineer,<sup>122</sup> and a report<sup>123</sup> written by Mr. Milani-Nia and Jaime Hass, a certified engineering technologist. It was completed in accordance with the American Society for Testing and Materials (ASTM) Designation: E 2018-01 Standard Guide for Property Condition Assessments: Baseline Property Assessment Process.<sup>124</sup>

Mr. Hass is employed by Pinchin in the Due Diligence and Building Condition Assessment Group. He received his diploma in construction engineering technology from Algonquin College in 1988. Following graduation, he worked for the consulting firm CSA Building Sciences and then for Agra Earth and Environmental. While at Agra, he developed and established a Due Diligence Assessments Department, relating to building condition assessments. He was retained by clients to look at properties in conjunction with Environmental Phase I assessments, generally for the purposes of refinancing, a new mortgage, or a pre-purchase inspection. Mr. Hass began working for Pinchin in 2004. He testified that Pinchin is a consulting engineering firm that offers services in environmental due diligence, hazardous materials, occupational health and safety, training, and laboratory services pertaining to mould and asbestos. He created the Building Condition Assessment Department at Pinchin. Mr. Hass testified that during the course of his career he had been involved, in various ways, in more than two thousand building inspections.<sup>125</sup> Although he did not conduct the actual inspection, Mr. Hass was forthright and accepted the limitations and weaknesses of the work conducted by Pinchin where necessary. I accept his evidence.

Mr. Hass testified that he could not be sure why the Royal Bank and Midland Loan Services had requested the Building Condition Assessment, but he assumed it was for a refinancing. Nevertheless, he explained that the purpose for which the assessment was requested would have had no impact on the manner in which the assessment was conducted. He explained that all Building Condition Assessments done by Pinchin are performed in accordance with the ASTM standard.<sup>126</sup>

Mr. Hass testified that the ASTM designation is a US standard that has been adopted by many of Pinchin's clients (lenders, large property owners, etc.) and one that Pinchin's clients demand be followed when carrying out the Building Condition Assessment work. He explained that the ASTM standard is typically a visual assessment of the major components, which also includes the identification of potential liabilities and associated estimates to rectify the liabilities.<sup>127</sup>

In his testimony, Mr. Hass explained that there is no equivalent Canadian standard for Building Condition Assessments. He explained that a previous protocol, dating back to 1993, had been issued by the National Research Council, but it was his understanding that that protocol had been archived and was no longer being updated. Mr. Hass acknowledged that the National Research Council protocol was a more rigorous and exhaustive examination that included testing throughout the building. He noted that, in his 24 years of conducting building condition assessments, he had never seen one performed using the National Research Council protocol.<sup>128</sup>

Pinchin's work plan also included the following terms and conditions, limiting the scope of its assessment:

5. The CLIENT acknowledges that subsurface and concealed conditions may vary from those encountered or inspected. PINCHIN can only comment on the environmental and building conditions observed on the date(s) the assessment is performed.
6. The work will be limited to those locations and/or areas of concern identified by the client or scope of work as outlined in our proposal.<sup>129</sup>

### **Pinchin is aware of the leaks but fails to consider its own environmental assessment reports or obtain previous engineering reports**

In the work plan, Pinchin also acknowledged the history of the leaks at the Mall. Indeed, it was noted:

Based upon conversations with Mr. John Harding of Woodbourne-USA and a review of documentation provided by RBC Financial Group, it is Pinchin's understanding that *there has been considerable historical moisture infiltration and major deficiencies associated with the podium parking deck and roof system*. As such, Pinchin's proposal includes a Senior Building Science professional who will be able to not only assess the roof condition but be in a position to offer direction on the next steps required for further investigation and mitigative measures.<sup>130</sup> [Emphasis added.]

Mr. Hass explained in his evidence that he understood the "considerable historical moisture infiltration" to mean that, in the past, there had been moisture-penetration problems with the parking deck, and that the "major deficiencies" related to the watertightness of the parking deck.<sup>131</sup>

Mr. Hass testified that when he was retained to conduct the building condition assessment of the Mall in 2009, he was not aware of Pinchin's previous involvement with the Mall, and that neither he nor Mr. Milani-Nia had seen the previous Pinchin mould reports. Mr. Hass acknowledged that although he had searched to determine whether Pinchin had conducted a prior building condition assessment of the Mall, he did not search to ascertain whether any environmental assessments had been conducted, despite acknowledging that the reports were available to him. Mr. Hass explained that he did not conduct this search because at that time he was just trying to identify whether Pinchin had previous information on the building. He noted that even if he had looked for previous environmental assessments, they might not have come up in his search because they had been done for Scotiabank and not for the Mall. Mr. Hass confirmed that, under the procedures currently used by Pinchin, the reports prepared for Scotiabank would probably have been captured.<sup>132</sup>

The previous Pinchin files and reports would have shed light on the severe water-infiltration issues that the Mall had been facing for years. The failure by Pinchin to locate and review these materials was unfortunate.



This failure, together with the fact that only a visual inspection was conducted, led to a less than ideal Building Condition Assessment.

Mr. Hass confirmed that before conducting the assessment, Mr. Milani-Nia located an article on the Internet entitled “Mall roof leaks now stopped, says owner.” He acknowledged that he was aware that this article reported that the Mall had been “plagued” by roof leaks for years.<sup>133</sup>

As a result of reviewing this article, Pinchin advised Midland that there should be extensive investigation reports and information on the repairs conducted at the Mall. It asked that this information be provided.<sup>134</sup> In addition to this request, Pinchin made others in telephone calls and via the on-site representative when Pinchin was actually doing the assessment. Mr. Hass testified that Pinchin did not receive any of the historical information that came to light during the course of this Inquiry. Mr. Hass further confirmed that he had never seen any of the previous reports commissioned by any of the owners of the Mall.<sup>135</sup> In fact, the Royal Bank informed Pinchin when it confirmed its mandate:

To date, the Borrower has not provided any information with respect to the inspections he had carried out last year prior to starting work on the roof. It is unlikely the information will be forthcoming as the Borrower is somewhat annoyed with RBC at the moment. He still believes we should have given him the Lease reserve to repair the roof. Thank you.<sup>136</sup>

Mr. Hass testified that the fact that the owner of the Mall was not co-operating by providing information did not necessarily raise a red flag for him: it was not unusual for an owner to resist sharing information.<sup>137</sup> This dearth of previous records had no impact on how Pinchin performed the assessment.<sup>138</sup>

Subject to my earlier comments regarding Pinchin’s failure to locate its own existing reports about the Mall, it is clear that, as a result of circumstances beyond its control, Pinchin was never provided with the full picture of the situation at the Mall before conducting its assessment.

### **Pinchin observes evidence of “minor” leaks, but does not speak to tenants**

The Building Condition Assessment was carried out on June 3, 2009,<sup>139</sup> by Mr. Milani-Nia. Mr. Hass testified that Mr. Milani-Nia is a civil engineer by training (not a structural engineer), but that he has spent most of his 24-year career reviewing existing buildings and dealing with building sciences issues. Mr. Hass described building sciences as focusing on a building’s envelope, including its roof, walls, windows, and mechanical systems, all of which make the building function and keep it watertight and airtight.<sup>140</sup>

It appears that the site assessment conducted by Mr. Milani-Nia lasted a full day, from approximately 8:00 a.m. to 5:00 p.m.<sup>141</sup> Derek Alrove, a maintenance worker at the Mall, accompanied Mr. Milani-Nia on the inspection.<sup>142</sup>

It did not rain in Elliot Lake either the day of, or the day before, the inspection.<sup>143</sup>

The examination of the Mall conducted by Pinchin consisted of only a visual inspection,<sup>144</sup> or what the ASTM describes as a “walk-through survey”:

*walk-through survey, n* – conducted during the field observer’s site visit of the subject property, that consists of nonintrusive visual observations, survey of readily accessible, easily visible components and systems of the subject property ... Concealed physical deficiencies are excluded. It is the intent of this guide that such a survey should not be considered technically exhaustive. It excludes the operation of equipment by the field observer and is to be conducted without the aid of special protective clothing, exploratory probing, removal of materials, testing or the use of equipment, such as scaffolding, metering / testing equipment, or devices of any kind, etc. It is literally the field observer’s visual observations while walking through the subject property.<sup>145</sup>

Mr. Hass testified that he believed Mr. Milani-Nia had observed approximately five or six locations of leaking during his walk-through of the interior of the Mall.<sup>146</sup> One of these was at Zellers, where ceiling tiles had been removed and buckets placed on the floor.<sup>147</sup> Mr. Milani-Nia did not note any tarps or water-diversion devices in the store.<sup>148</sup> Evidence of leaks was also noted at the Soul Mate and Dollarama stores.<sup>149</sup> There was no evidence of active leaks there during Mr. Milani-Nia's inspection, probably because it had not rained for two days.<sup>150</sup>

Mr. Hass confirmed that Mr. Milani-Nia did not conduct a closer examination of the areas where the stained ceiling tiles had been noted because climbing a ladder to look above the ceiling tile is not typical of the protocol followed by Pinchin for a Building Condition Assessment.<sup>151</sup> This restrictive practice seems somewhat incurious and perfunctory to me.

Mr. Milani-Nia also conducted a walk-through of the exterior walkways, both at grade level and on the second level. He observed evidence of minor corrosion of the steel beams.<sup>152</sup> In addition, he noted deterioration or cracks in the control joints of the precast hollow core concrete in the walkways.<sup>153</sup> Mr. Hass described the corrosion observed by Mr. Milani-Nia as surface corrosion on the top flange of the steel beams in certain locations, as well as some minor corrosion on the columns of the walkways.<sup>154</sup>

In addition, Mr. Milani-Nia performed an assessment of the rooftop parking deck. He noted that some work had been undertaken or was ongoing at the time of his inspection.<sup>155</sup> Pinchin was aware that the Algo Mall did not have a membrane installed on the rooftop parking deck and that the building was constructed with precast hollow core slabs.<sup>156</sup>

Given the limited scope of the inspection, Mr. Hass agreed that in many cases the columns and beams in the Mall were concealed and not readily visually accessible. Mr. Milani-Nia observed the beam only in the Zellers store where the ceiling tile was removed, and he observed the columns that supported the walkway only on the exterior of the building.<sup>157</sup>

Mr. Milani-Nia's notes reveal that he did not speak to any of the tenants during his inspection. Mr. Hass testified that, as part of their mandate, inspectors typically try to speak to the tenants in order to gain more information. In the case of the Mall, his "guess" was that there were no tenants for Mr. Milani-Nia to meet with who had any real knowledge.<sup>158</sup> In cross-examination, Mr. Hass admitted that the ASTM standard directed inspectors to speak with tenants.<sup>159</sup> He agreed that it was important to speak to tenants because they are actually on site and may have information about the severity, frequency, and duration of the leaks in a particular place.<sup>160</sup> He also agreed that a prudent inspector should have spoken to Mall tenants about repairs that might have been recently undertaken and could have been concealing areas of recent leaks.<sup>161</sup> It is unfortunate that Mr. Milani-Nia did not adopt this practice. Had he spoken to only a few of the tenants (such as Zellers, Scotiabank, and Library employees), he would have gleaned important information about the history of the leaks.

### **Pinchin concludes that the Mall is in "satisfactory" condition**

On June 19, 2009, Pinchin provided its Building Condition Assessment report to the Royal Bank.<sup>162</sup> Although the actual report was entitled "Preliminary Building Condition Assessment," I was informed by Mr. Hass that Pinchin's protocol at that time was to identify all Building Condition Assessments as preliminary. No subsequent final report was anticipated or issued.<sup>163</sup>

Mr. Hass confirmed that he and Mr. Milani-Nia were concerned about the effect of the water infiltration on the precast concrete. For that reason, they specified in the report that the precast concrete panels needed to be evaluated for concrete delamination.\* He confirmed that their concern was based on the knowledge that the

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\* See glossary.

water infiltration was an ongoing historical problem and that de-icing agents, including chlorides, likely would have infiltrated the building.<sup>164</sup>

The Pinchin report noted that it had been previously determined (by others) that placing a membrane over the concrete topping was not a viable solution because of load capacity issues. As I have explained elsewhere in this Report, this conclusion was incorrect. Pinchin recommended the following two options to address the water-infiltration problem:

1. removing portions of the concrete topping, applying a waterproofing membrane, and reinstating the concrete topping in phases; or
2. monitoring the concrete topping for new cracks and any damage to the expansion joints and control joints, and carrying out repairs in a timely manner.<sup>165</sup>

Mr. Hass acknowledged that the solutions put forward by Pinchin recognized that certain remedial work needed to be done.<sup>166</sup>

Pinchin estimated the cost to carry out the proposed repairs for the roof deck parking at approximately \$2.68 million, which included the waterproofing and the repairs to the concrete.<sup>167</sup> Mr. Hass testified that the recommendations and costing for the repairs to the parking deck were spread over four years because the owner would not be able to shut down the entire parking area at once.<sup>168</sup>

Pinchin noted that the condition of the precast concrete panels could not be determined because the scope of work did not include any destructive testing (removing material from the building).<sup>169</sup> It recommended that further investigation of the precast panels be conducted, given concerns over the historical water infiltration that had occurred at the building and the effects of the chlorides on the precast panels.<sup>170</sup>

Pinchin noted in its report that there were no major or minor deficiencies in the structural elements of the Mall, and therefore no recommendations were made. The report went on to say:

Pinchin's review of the structural elements indicated that *no major deficiencies existed within the visibly accessible components* of the Site Building, which would compromise the integrity of the structures.<sup>171</sup> [Emphasis added.]

Pinchin concluded:

Based on Pinchin's review of the property ... *the Site Building appears to be in satisfactory condition and in comparable standing with other similar retail/hospitality property.* The building generally appears to have been constructed in compliance with contemporary building codes and standard building practices in place at the times of construction. The assessment did not reveal any evidence of major structural failures, soil erosion or differential settlement.<sup>172</sup> [Emphasis added.]

When asked on what basis it had reached this conclusion, Mr. Hass testified:

That determination is we have looked at the property as a whole and identified the components of the property, starting from the top down, so to speak, and identified that it is performing. You know, there was nothing there indicative of immediate red flags that would alarm us to ... make a statement, a more powerful statement.

And that statement, of course, has to be read in conjunction with the fact that we had recommended a significant amount of work pertaining to the parking deck as well.<sup>173</sup>



When pressed further by Commission counsel on the meaning of “satisfactory,” Mr. Hass explained:

Keeping in mind that repairs had been ongoing for the parking deck specifically and reports that there were leaks [that] had been stopped, based on our observation, and keeping in mind it is not uncommon, although this was a bit of a unique building ... to walk a building and see roof leaks, whether it is a retail type of building, whether it is an industrial building, whether it is a residential building. We see leaks all the time as far as penetrating roofs or wall problems, et cetera. You know, they are performing. They are leaking and they have leaks and they have issues that have to be dealt with for certain, but they are still performing.<sup>174</sup>

As I explain further below, I am troubled that Pinchin could in fact have concluded that the building’s condition was “satisfactory,” given its knowledge of the history of the leaks at the Mall.

That being said, Mr. Hass acknowledged during his testimony that

- he could not say that the building was “performing” with respect to the specific criteria of watertightness;<sup>175</sup>
- the Pinchin report did not define the term “satisfactory” and did not provide a range of what “satisfactory” meant on a scale of “excellent” to “poor” condition;<sup>176</sup>
- it was reasonable for a reader to interpret the phrase “the building is satisfactory” to mean that there were no major structural concerns with the building and that the building is structurally sound;<sup>177</sup>
- there was no limiting comment in the Structural Elements section of the report (section 3.4) that advised the reader that only two areas of columns and beams had been inspected, neither was there a definition of the phrase “visibly accessible”;<sup>178</sup>
- Pinchin did not recommend that the areas where stained ceiling tiles had been noted be inspected by a structural engineer or that those areas be looked at more closely;<sup>179</sup>
- Pinchin did not identify the corrosion observed on the exterior walkways as being an issue and did not make a recommendation that a further investigation of the corrosion by a structural engineer be undertaken;<sup>180</sup>
- no one at Pinchin reviewed the load capacity of the hollow core precast slabs because such a review, according to Mr. Hass, was beyond its mandate;<sup>181</sup>
- the connections inside the Mall were not inspected, but Mr. Milani-Nia would have seen some of the connections on the exterior walkways;<sup>182</sup> and
- Pinchin did not recommend that a structural engineer be retained to further investigate the beams under the walkway.<sup>183</sup>

Pinchin did not report the observations it made at the Mall to the City of Elliot Lake or to any other regulating body. Mr. Hass and Mr. Milani-Nia felt strongly that, apart from the recommendations for further investigation of the hollow core precast slabs and the need to perform waterproofing repairs, nothing was observed that raised a red flag or was noted as being life threatening.<sup>184</sup>

Unfortunately, the visual inspection conducted by Pinchin did not reveal what was hidden above the Mall’s ceiling tiles. The previous engineering reports of the Mall and the Mall’s own previous inspection reports would have shed light on the rust that was creeping through the Mall. Pinchin never saw them.

In light of the fact that Pinchin was aware of the water infiltration and had concerns about its existence, I feel it is not unduly critical to suggest that Pinchin should have

- notified the Royal Bank and Midland Loan Services that the continued infiltration of the chloride-containing water would cause deterioration to the Mall’s structure, which could result in a potential failure of the various structural components;

- made clear in its report that the assessment of the structural elements was based solely on those structural elements that were visible and accessible without the removal of any finishes or ceiling tiles; and
- recommended that a structural engineer be retained to further investigate the degree of rust and corrosion observed and to determine if the structural integrity of the building had been compromised.

There was no evidence before me that the Pinchin report was provided to Eastwood directly or by Pinchin's clients.\* Since Bob Nazarian repeatedly testified about his reliance on the October 2009 report from Mr. Wood, I conclude that he did not see the Pinchin report. If he had, he would have relied on it, chosen the least expensive option (if any at all), and continued existing practices.

## **June: Land purchase – despite his claim to the contrary, Bob Nazarian was not prepared to buy the land at market value**

### **The City is prepared to sell the land for \$55,000**

On June 19, 2009, Ms. Sprague sent a draft agreement of purchase and sale to Mr. Fabris for the municipal property sought to be purchased by Eastwood.<sup>185</sup> It set the purchase price at \$55,000, the lower end of the range established by the appraiser. Ms. Sprague agreed that this draft agreement was an attempt on her part to inform Mr. Fabris of the value of the land and to get the negotiations underway. The agreement required that construction of the parking facility be started no later than 24 months from the date of closing and completed within six months thereafter. Ms. Sprague explained that, to avoid the sale of land to speculators, any sale of City land required that the purchaser develop or build on the land in the way the City intended. The draft agreement allowed the City to repurchase the property if the purchaser did not meet this requirement.<sup>186</sup>

Bob Nazarian testified he did not agree to the City's offer. The price was not a problem, according to Mr. Nazarian: "Not that \$55,000 was too much or too little. About the land for me, that was completely secondary."<sup>187</sup> He said there were other conditions that he did not like, particularly the requirement that the project be started within two years and finished in six months.

When asked whether that requirement was unreasonable, he testified he was not sure he would get the proper funding; nor was he sure how long it would take to finish. He "didn't want strings attached in another [sic] way." He wanted to purchase the land and look for proper funding for the construction. However, when questioned, he could not recall what had been done in 2009 to find proper funding and to contact engineers and construction companies. He testified he personally spoke to Mr. Bauthus about this clause and told him that "if City's concerned about this, largest taxpayer in Elliot Lake should have taken the initiative to give us the piece of land with no charge and even help us to make it because of our concern." Mr. Nazarian could not recall when he told him that, nor could he give an approximate time period. He could not say what other provisions of the draft agreement he was unhappy about because he left the negotiating to Mr. Fabris. According to Mr. Nazarian, Mr. Fabris felt it was unfair that the City had sold land to the No Frills store at \$5,000 per acre but was asking for \$55,000 for a "wasteland." Mr. Nazarian testified that Mr. Fabris "felt that the City was taking advantage of the situation."<sup>188</sup>

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\* Mr. Hass testified that he did not know whether the Pinchin report was provided to the owner of the Mall: Hass testimony, June 14, 2013, p. 14617.

## Eastwood is not prepared to pay \$55,000 for the land

On June 23, 2009, Mr. Fabris sent a letter to Ms. Sprague in which he stated that he and Bob Nazarian were surprised at the value of the land and requested a copy of the City's appraisal. He noted that surrounding properties had been sold at less than \$1,400 per acre and that his client was not prepared to pay \$55,000.<sup>189</sup>

On June 24, 2009, Ms. Sprague replied, indicating that the appraisal the City obtained valued the land at \$1.49 per square foot, or \$45,000 per acre. She advised Mr. Fabris that she was not at liberty to provide a copy of the appraisal but that he could commission his own. Ms. Sprague then went on to indicate that the *Municipal Act* prohibited leasing or selling property below fair market value.<sup>190</sup> When asked why the City did not want to provide a copy of the appraisal report to Eastwood, she explained that the appraiser prohibited the sharing of the report with others.<sup>191</sup>

Mr. Bauthus testified that the City's policy was that it did not show appraisals to potential purchasers.<sup>192</sup>

Ms. Sprague agreed, however, that the report was the property of council and that council could have asked Mr. Shames to allow for the disclosure of the report to the potential purchaser.<sup>193</sup>

I acknowledge that the appraiser had concerns about his report being shared. It appears to me, however, that in light of the reason why Bob Nazarian said he wanted to purchase the land (to stop the leaks) and the fact that he saw any refusal on the part of the City as simply the City "acting against him," it would have been reasonable for the City in this case to take steps to share the report with him, having sought the appraiser's permission. What was the harm?

## June–July: Library lease – Eastwood plays a “cat and mouse game” with the City

### June 30: Eastwood evicts the Library from the Mall

Six days later, on June 30, 2009, Mr. Fabris sent a letter to Mr. Bauthus in which he said:

I have been instructed by my client, Eastwood Mall, to contact you with respect to the space currently being occupied by the Elliot Lake Public Library.

Eastwood Mall has advised me that the space will no longer be available to the library for lease, as there is a new tenant moving into the space.

We therefore give you notice that you are to vacate the library space as of October 31st, 2009.<sup>194</sup>

Bob Nazarian testified he saw that letter. He explained:

I did not agree that 100 per cent with that. We had an LOI [Letter of intent] from a tenant that would like to occupy the space ... but under no circumstances we wanted to give away the library of Elliot Lake.

So, we had some discussion with Mr. Fabris and later on, we change our opinion that library should stay where it is and new tenant has to wait to find a different location.<sup>195</sup>

He testified that he asked Mr. Fabris to send a letter to the City to see what was happening with the lease renewal and explained that the letter which was sent resulted from a misunderstanding. He did not know how that misunderstanding developed. He did not have a conversation with Mr. Fabris before the letter was sent and claimed it must have been an error made by Mr. Fabris's secretary. When asked if it was his evidence that Mr. Fabris, on his own, came up with the idea to move the Library out, Mr. Nazarian replied, "No comment, sir."<sup>196</sup>

Mr. Fabris, on the other hand, testified that he was indeed acting on instructions from Bob Nazarian, who had advised him to evict the Library. He also testified that Mr. Nazarian had told him that the space would no longer



be available for lease to the Library. Mr. Fabris understood that there was a Letter of Intent from a major anchor tenant to move into that space.<sup>197</sup>

Mr. Bauthus testified that he was in a state of disbelief when he received this letter. Nothing had been mentioned up to that point about a new major tenant coming to the Mall.<sup>198</sup> This announcement exacerbated his concern about Bob Nazarian's lack of good faith.<sup>199</sup> Mr. Bauthus testified that when he received this letter, he spoke to the mayor and asked for a council meeting to inform council of the state of the negotiations with Eastwood.<sup>200</sup> The meeting took place on July 13, 2009.

Mr. Fabris confirmed that Mr. Bauthus spoke to him following the receipt of the letter and advised him that the Library would move out of the Mall and into the Collins Hall.<sup>201</sup>

### **July 9: Bob Nazarian backtracks and claims it was a mistake – he does not want to evict the Library**

On July 9, 2009, Mr. Bauthus spoke to Bob Nazarian. Mr. Bauthus outlined the content of this conversation in the first of two memos he provided the mayor and City Council on July 10, 2009. Mr. Bauthus wrote:

In response to a phone call from me on July 8, 2009, Bob Nazarian returned my call to discuss the letter dated June 30, 2009.

I indicated that we had received a letter dated June 30, 2009 from Antoine-René Fabris and based on the contents of the letter, and a subsequent phone call to Mr. Fabris, the City is making arrangements to vacate the mall.

Mr. Nazarian indicated that the letter was a mistake and that he had not directed Mr. Fabris in this regard. He further stated that he could not answer to a prospective tenant until the end of this month to give us an opportunity to discuss what the City is doing with the Library space. I indicated to Mr. Nazarian that the City was in the process of making application for grants and that depending on the outcome of those applications we would need two years if successful and a five and five if not successful at this time in securing funding. I indicated that I had relayed this to Mr. Fabris sometime ago.

Mr. Nazarian indicated that he would need a five year lease with us. I stated that in view of the current funding applications we could not commit to five years at this time.

Mr. Nazarian raised the issue of the request to purchase the land from us and did not agree with the price. He felt that it should be given to him because it was in the interest of the City and the mall to have a successful enterprise. I advised that this was a separate issue and did not comment further.

I indicated that we took the eviction notice very seriously and have started making alternate arrangements for the library. Mr. Nazarian reiterated that it was a mistake and that he did not direct Mr. Fabris to take this action. I indicated that as Mr. Fabris is his legal representative we have every reason to assume that the direction is that of the mall and acted accordingly. I also indicated that Council will be dealing with this on Monday, July 13 and at that time setting the course for the future library space requirements.

Mr. Nazarian indicated that this was all a mistake, that he did not direct Mr. Fabris to write the letter and that he had prepared an e-mail to Mr. Fabris asking him to write a letter to the City retracting the eviction notice of June 30, 2009. As of Friday morning I have not received a phone call or letter indicating anything of such nature.<sup>202</sup>

Mr. Bauthus testified that he was very upset with the turn of events.<sup>203</sup> During his phone call with Bob Nazarian, Mr. Nazarian attempted to link the issues of the purchase of the municipal land with the renewal of the Library lease, suggesting that if the City sold him the land, he might be more amenable to the City's desires with respect to the Library lease.<sup>204</sup>

The same day, Mr. Bauthus informed Ms. Morin of his discussion with Bob Nazarian. She in turn told the members of the Library board that Mr. Nazarian claimed that Mr. Fabris's June 30 letter was a mistake and that Mr. Nazarian had offered the Library a five-year lease. In reaction to this email, Councillor Collett responded to some members of the Library board as follows: "What the hell kind of game is this guy trying to play with us???"<sup>205</sup> Mr. Collett testified that he was very upset by what was going on. He explained, however, that it was typical of Bob Nazarian:

It was a cat-and-mouse game. [Bob Nazarian] went back and forth, back and forth, pushed you to the limit, and it was the same as how he handled contractors. As I said earlier, he would push you to the limit.<sup>206</sup>

Mr. Collett testified that when the City first received the Notice to Vacate, he did not actually believe that Bob Nazarian had a tenant waiting to occupy the space. Mr. Collett testified that he believed it was part of Mr. Nazarian's negotiation tactics with the City.<sup>207</sup>

Mr. Fabris testified that he never received an email from Bob Nazarian about a possible retraction letter, and he did not write a letter retracting the eviction notice. He testified that he confronted Mr. Nazarian during a conference call with Mr. Sennett and reminded him that he (Mr. Fabris) had indeed received these instructions from him in the presence of Mr. Sennett. Mr. Fabris advised Mr. Nazarian that he was not prepared to retract his letter and that Mr. Nazarian could retract it himself if he wished: "He wanted me to admit that it was my mistake and fall on my sword. No, I wasn't willing to do that." Mr. Fabris testified that although Mr. Nazarian initially denied that he had given those instructions, Mr. Sennett came forward and verified his account. Mr. Nazarian, in the face of Mr. Sennett's confirmation, advised Mr. Fabris that he was going to deal with the City himself, but he never acknowledged the fact that he had given those instructions.<sup>208</sup> Mr. Fabris testified that Mr. Nazarian had a "tendency to fly off the handle," but that he certainly took some precautions: "If there was [sic] instructions given, there were witnesses present."<sup>209</sup> According to Mr. Fabris, written instructions were very rare from Mr. Nazarian.<sup>210</sup> This practice is not surprising given Bob Nazarian's own evidence that he did not like "to leave paper trace."<sup>211</sup>

As it turns out, Mr. Fabris did send a letter of retraction to the City on July 9 in which he admitted to having made a mistake.<sup>212</sup>

I sympathize with the City's reaction to the eviction letter. It appears that, to the City, the letter was a deliberate action on the part of Bob Nazarian either to get rid of the Library because he thought he had a better offer from another potential tenant or to retaliate because he was upset that the City was not prepared to sell him the municipal land at a much lower price. I suspect that the latter is the most likely reason.

### **July 9: Eastwood claims it wants to keep the Library and offers a five-year lease; Mr. Bauthus recommends to council that it consider moving the Library to the Collins Hall**

On July 10, 2009, Mr. Bauthus received two letters – one from Mr. Fabris and one from Ms. Laroue.\* Mr. Fabris wrote:

I apologize for any inconvenience this has caused, however I am advised by my client, Eastwood Mall, that through my own error, a lease has not be [sic] signed for the library premises, and no letter of intent has been signed.

As such, the library board has until the end of the month to decide.<sup>213</sup>

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\* Exhibits 11-35, p. 4802; Exhibit 11-36. Although these letters are dated July 10, it appears they were not delivered to Mr. Bauthus until later that day, after he had provided the mayor and council with his first memo of that day. His second memo of that day (Exhibit 11-190) refers to both letters.

Ms. Laroue wrote:

It has been brought to my attention that a misunderstanding appears to have happened regarding to [sic] the City of Elliot Lake Public Library lease and the Algo Centre Mall. We do not have a signed lease with a new tenant for the space B8-C4 which is currently rented to the City for the Public Library.

We apologize for any confusion or inconvenience that may have been caused due to a misunderstanding between Mr. Bob Nazarian and our Lawyer Rene Fabris.

We are quite willing to work with the City in signing a new 5 year lease. In fact, the City has until the end of July to let us know if they are willing to extend their lease.<sup>214</sup>

Ms. Laroue testified that she was instructed by Bob Nazarian to write this letter. She testified that, to her knowledge, there was no other possible tenant interested in renting the space then occupied by the Library. Ms. Laroue testified that any suggestion to the contrary was a tactic on the part of Mr. Nazarian.<sup>215</sup> Mr. Bauthus testified that when he received the letter from Ms. Laroue, he was not happy and was not hopeful that the City could come to a final agreement on the lease since, given what had transpired to date, there was a general air of mistrust surrounding the negotiations. Although Ms. Laroue had indicated there was a misunderstanding, she did not advise that Eastwood was willing to sign a two-year lease, despite the fact that Mr. Bauthus had advised Bob Nazarian that the City was not in a position to sign a five-year lease owing to the plans for the multiplex.<sup>216</sup>

Following the receipt of Ms. Laroue's letter, on July 10, 2009, Mr. Bauthus, in his second memo of the day, provided the mayor and the council with an update on the Library lease:

Further to my memo dated Friday, July 10, 2009, a letter from the General Manager of the Algo Centre Mall was delivered to my office stating that there was a misunderstanding in terms of the letter dated June 30, 2009 from Antoine-Rene Fabris, however, the letter does not specifically retract the demand to vacate by October 31, 2009. In fact the letter states that they're willing to sign a new five year lease and we have until the end of July to let the mall know if we wish to extend the lease. We also received a letter from Mr. Fabris that is very similar in context.

Based on these letters I would suggest that the notice advising of eviction by October 31, 2009 is still in effect particularly if we refuse to enter into a five year lease by July 31, 2009.<sup>217</sup>

Mr. Bauthus testified that he indicated in the memo that the eviction notice was still in effect because Mr. Fabris's letter had been very specific and he believed the eviction would still be "hanging over" the City's head. He further confirmed that he was faced with having to look into alternatives for the Library because it seemed as though it might not be possible for the Library to stay in the Mall.<sup>218</sup> Mr. Bauthus went on to write:

Given that we are presently pursuing funding to construct the multi-use facility which includes the library and if successful we would be looking at 24 to 36 months to complete the facility and move the library into the new quarters. Accordingly, until this issue is finally settled we should not commit to any rental in excess of two years. If we are not successful then we would have to look at a longer-term of up to 10 years to allow time to develop the funds to construct the multiplex. It is anticipated that we would require 30 to 60 days to deal with our application to the Minister. During this period we would need to have the facility to house a library.

The challenge in finding appropriate space to house the library is the size and the floor load capability. We are presently using approximately 8500 ft.<sup>2</sup> for the library and its ancillary programs and we need a floor load capacity of 150 pounds per square foot which is significantly greater than what is normally required for regular use. Accordingly, any facility would have to have a slab on grade to accommodate the weight. There are limited facilities in the city that meet these criteria.



In addition there would have to be sufficient time to allow for leasehold improvements to accommodate the library which is estimated at between six months and 12 months. This creates an immediate problem with the eviction letter on file. The most prudent process would be to move to the Collins Hall and then review the options available to us. If we are unable to secure the funding to move ahead with the multiplex than [sic] the decision would be to either leave the library in the Collins Hall or select another site and retrofit that site to accommodate the library. This is assuming that the mall is no longer available.

Alternatively we can go to the mall and negotiate a new lease. In this respect I would suggest that if the minimum lease is five years then we have a 12 month exit in the event that there are alternative solutions or the water problem continues. This allows us to continue with the application for funding for the multiplex and if successful move when the facility is complete without a long-term commitment. The mall will have a minimal commitment in the way of leasehold during this period as well. Otherwise we should let it go on a month-to-month basis.<sup>219</sup>

Mr. Collett testified that he agreed with Mr. Bauthus that the City should not commit to a lease in excess of two years. He explained that the City would certainly not entertain more than a three-year lease with a one-year option.<sup>220</sup>

Mr. Bauthus explained that if the City did not obtain what it wanted in terms of the lease, he proposed that the Library turn the lease into a month-to-month tenancy.<sup>221</sup> Mr. Bauthus went on to conclude in his memo:

The current lease is quiet on the wording for notice and renewal however it does state that in the event that there is not the execution and delivery of a lease and the tenant remains in possession of the premises the space shall be occupied on a month-to-month basis under the same terms and conditions as the existing lease.

Irrespective of a short term lease month to month or any other arrangements, we should be prepared to move to the Collins Hall on short notice. Until we have a long term lease or alternate arrangements for the library there will always be the issue of the mall requesting us to leave on short notice.

As an observation irrespective of the term of any potential lease with the mall, it would appear to be beneficial to the mall to have the library located in the mall for the next two to five years. With projects that we are undertaking, Spine Road Development, Cottage Lot Development, Highway 108 improvements and the CIP [Community Improvement Program], the economic fortunes in the City are improving which might in turn make the mall more viable and attractive for additional retail to locate in the mall, while still receiving rent for a major space.<sup>222</sup>

Regarding the mention in the report that it might be beneficial for the Mall if the Library were to stay, Mr. Bauthus testified he meant that the Mall would continue to receive rent for that space until the multiplex was established. He further confirmed that he thought the Library was important to the economic survival of the Mall and, in turn, the viability of the Mall was important to the economic survival of the City.<sup>223</sup>

With regard to the last sentence of his memo, Mr. Bauthus meant that if the Library could stay in the Mall for two to five more years and then leave, it would not harm the Mall. He had also determined that the Collins Hall was suitable for the Library in terms of load capacity and was a viable choice.<sup>224</sup> Mr. Bauthus made this suggestion to council knowing that, at the time, the Mall had water problems and, despite his concerns (which dated back to September 12, 2008),<sup>225</sup> there could be possible structural issues owing to rust and water. He admitted in his testimony that those concerns and issues had not been resolved between September 2008 and July 2009.<sup>226</sup>

Mr. Collett testified that he was in agreement with Mr. Bauthus's views that the Library should stay in the Mall – the City was not only trying to get the multiplex developed but had other expenditures as well. Mr. Collett testified that the City did not think it was viable to move the Library to another location for a short term and then into the new complex. He clarified his opinion by explaining that the Library was under the impression that

Bob Nazarian would fix the leaks and that there would be a guarantee that any future leak damage would be at the owner's cost. The Library held to this position throughout the negotiations.<sup>227</sup>

Mayor Hamilton testified that, although the Collins Hall was an option, he did not support it because the City was using this facility for other activities and it would have to accommodate them elsewhere. He agreed with Mr. Bauthus that it would be beneficial to the Mall to have the Library located there for the next two to five years.<sup>228</sup>

It is apparent to me that the City's decision was motivated more by its concern over the importance of the Library to the Mall, and the Mall's importance to the community, than by the safety of the Library staff and its patrons.

### **Despite the leaks not being fixed and against the Library's wishes, City Council directs City staff to negotiate a lease with Eastwood**

On July 13, 2009, as a result of Mr. Fabris's letter of June 30 evicting the Library,<sup>229</sup> a special public meeting of City Council was convened. Representatives of two media outlets were present. As the minutes show, Mr. Bauthus provided an overview of the events and Katherine Croxson, then chair of the Library board, addressed council concerning the board's position on the termination of the lease agreement.<sup>230</sup>

Mr. Bauthus's notes of the meetings indicated the following:

Katherine Croxson

- Needs have been articulated.
- Library Board will be signing leases.
- Moving library twice is not a question.
- If a lease then should be month to month.
- Not 5 years.
- Very disappointed.
- Lease to address water.<sup>231</sup>

Mayor Hamilton, Mr. Collett, and Mr. Bauthus all testified that it was very clear that the Library did not want to stay at the Mall because of the leaks, which council had been aware of for a number of years.<sup>232</sup>

Mr. Collett testified that Ms. Croxson advised council that the Library board would agree to a short-term lease on the condition the leaks were fixed. If not, the damages would be at the expense of the owner, and the Library would be able to terminate the lease at no cost.<sup>233</sup>

As noted in the minutes, council gave direction to City staff "to negotiate a lease renewal or extension of the lease for the library facility with a shorter term lease and with a clause to withhold rent in compensation for damages due to leakage."<sup>234</sup>

Mr. Bauthus testified that there was discussion during this meeting of moving the Library into the Collins Hall, but it was not well received by the council or the public.<sup>235</sup> Both parties felt that having the Library in the hall would have an impact on its use as a community centre.<sup>236</sup> In terms of public objection, Mr. Bauthus indicated that a couple of long-time residents of Elliot Lake had come to his office to voice their complaints.<sup>237</sup> (In fact, at least one letter against the move by a citizen was introduced into evidence.<sup>238</sup>) Mr. Bauthus testified that council gave directions to negotiate a lease, despite the Library's position, because it believed the Library was important to the Mall.<sup>239</sup> Mr. Bauthus agreed that he, the council, and the mayor knew that the Library had been leaking for more than 30 years, but he testified that councillors thought that Bob Nazarian would continue to work on those leaks and, they hoped, attenuate them.<sup>240</sup>

Mayor Hamilton agreed that the council had now made a decision to negotiate a renewal – despite the leaks – contrary to what Mr. Bauthus had indicated to Ms. Croxson in April 2008. (He had told her then that, before making a decision about renewing the lease, the City would wait to learn that the leaks had been fixed.) Mayor Hamilton admitted that in fact the leaks had not been fixed. When asked why council reversed its position, he testified that at that particular time it was trying to minimize the impact of moving. Council was waiting for the result of the multiplex funding application and was concerned about moving more than once. The City was attempting to negotiate a shorter-term lease extension at the Mall with a provision to withhold rent in compensation for damages.<sup>241</sup>

Mayor Hamilton admitted that the Library

- did not want to stay in the Mall;
- did not want an extension of the lease to be negotiated; and
- had been told by Mr. Bauthus, with Mayor Hamilton's blessing, that it would not have to stay in the Mall unless the leaks were fixed.<sup>242</sup>

Mayor Hamilton also admitted that the council had reversed its position and that he supported this decision because of the cost and inconvenience of a second move. Contrary to Mr. Bauthus, he denied that the decision had anything to do with maintaining the economic viability of the Mall, even though this consideration had been mentioned in a number of memos prepared by staff.<sup>243</sup> I find it difficult to accept that cost and inconvenience were the mayor's sole motivators.

The Library was not concerned with the inconvenience of moving. It was concerned with the inconvenience and possible harm that the leaks caused its patrons and staff.

This decision of council was made despite Bob Nazarian's machinations, the Library's opposition, knowledge of the effects of long-term leakage, and Mr. Bauthus's advice that

[t]he most prudent process would be to move to the Collins Hall and then review the options available to us. If we are unable to secure the funding to move ahead with the multiplex than [sic] the decision would be to either leave the library in the Collins Hall or select another site and retrofit that site to accommodate the library.<sup>244</sup>

## July–August: Library lease – City Council pushes forward with its plan to keep the Library in the Mall

### City Council ignores the Library's "bottom line" of no leaks

On July 15, 2009, Bob Nazarian sent Mr. Bauthus his proposed lease terms for the Library.<sup>245</sup> The next day, Mr. Bauthus forwarded those terms to Ms. Morin. Later that day, Ms. Morin informed Mr. Bauthus by email, copied to members of the Library board, that she would discuss the terms with the Library board or with Ms. Croxson. She advised him that three leaks in the old "drip zone area" had resurfaced the day before because of the rain. Ms. Morin also raised several concerns about the proposed terms of the lease, including issues related to the leasable area, the heating, ventilation, and air conditioning (HVAC) system, the option to renew, and the monthly rent.<sup>246</sup>

Mr. Collett testified that the board continued to participate in the discussion about the terms of the lease, despite its opposition to remaining in the Mall. The board believed its negotiations amounted to a confrontation with Mr. Bauthus. It appears that it wanted to keep close tabs on him and ensure he was aware of the board's position.<sup>247</sup>



On July 16, 2009, Ms. Croxson sent an email to Ms. Morin in which she outlined the points that board members would agree on or wished to add to the lease. At item number 5, Ms. Croxson indicated:

[T]he Board will not agree to a 5 year lease. We would agree to a month-to-month lease but, failing that, a 2–3 year lease, renewable in each of the years would be acceptable. However, the terms of the lease would be conditional upon no leakage at all. Any leakage would nullify the lease and repairs would have to be done immediately with the Landlord responsible for any damage to Library materials as well as the repairs required.<sup>248</sup>

There is no doubt that both Mayor Hamilton and Mr. Bauthus were aware of the Library's position.<sup>249</sup> The Mayor testified that the City was striving to obtain terms satisfactory to the board and that nothing was a deal-breaker – he wanted to see where the City was able to go in the negotiations. He further testified that he did not tell Ms. Croxson or anybody else from the Library, and did not direct anyone to tell them, that the City was not going along with the conditions, particularly the condition involving no leakage at all. When he was asked why not, Mayor Hamilton provided the following less than satisfactory answer:

I have never seen this memo before, so this is the first time I see this. But with respect to negotiations, we need to understand what we can and can't do. So in regards to this, we were negotiating a lease and that lease progressed to a point where we ended up with a lease, sir.<sup>250</sup>

The City was not going along with the Library's bottom line. The mayor did not advise the Library accordingly because he believed Mr. Bauthus would have had discussions with the Library on the subject.<sup>251</sup>

On July 17, 2009, Mr. Bauthus met with Bob Nazarian, Mr. Sennett, Mr. Fabris, and another individual who accompanied Mr. Nazarian to negotiate the Library's lease. In his typed notes of the meeting, Mr. Bauthus wrote:

Term of the lease

Because of multiplex application cannot sign a 5 year lease. Consider two year notice if BCF funding available.

Rental rate

\$13.00 per foot too high – there are no leaseholds. If enter into a lease what are the leaseholds that will be done? Paint, carpet entrance?

Represents a 47% increase over current rent

Taxes to be reviewed

...

Water infiltration

Need wording to deal with the water – needs to [sic] some recognition that the water problem is not totally solvable but reasonable efforts made to ensure leakage is not extreme and ruinous to the collection nor does it create mold problems.<sup>252</sup>

With regard to the notation under the heading "Water infiltration," Mr. Bauthus testified that it reflected the discussion he had with Bob Nazarian.<sup>253</sup> Mr. Bauthus did not agree that the lease should contain language to recognize that the water problems were "not totally solvable," but he wanted the lease to contain language recognizing that Eastwood would be responsible for the leaks and have to do something about them.<sup>254</sup>

Mr. Bauthus knew the Library's position about terminating the lease if there were leaks, but he did not advocate it. He also knew that the Property Standards By-law required that the building be watertight and leak-free.<sup>255</sup>

He testified that, according to his position, the City wanted to include something in the lease whereby Eastwood would have to address the leaks – that the Library could vacate "if they continued to some degree."<sup>256</sup> He explained that the position he held was a midpoint between the Library's position and Mr. Fabris's initial position

that the lease should not address anything related to leaking problems.<sup>257</sup> Nonetheless, Mr. Bauthus stated that, at this point, he knew Eastwood would never agree to a term in the lease that allowed the Library to terminate it if there were any leaks. He continued to negotiate because he was given direction by council to do so.<sup>258</sup>

Mr. Bauthus testified that he was also told by Bob Nazarian that a prospective tenant was ready to sign a lease for the Library space, was going to do its own tenant fit-ups, and would pay more in rent, so the City would need to hurry and sign the lease.<sup>259</sup> This testimony was consistent with Mr. Fabris's letter of June 30 and Ms. Laroue's letter of July 9, which stated that the Library had until the end of July to sign the new lease.<sup>260</sup>

Mayor Hamilton agreed that the approach adopted by Mr. Bauthus during this meeting was inconsistent with what the Library wanted, but consistent with the resolution of council. He admitted that the positions of the Library and the council were a long way apart. Mayor Hamilton testified that he asked Mr. Bauthus to negotiate the best deal possible. When asked, he denied advising Mr. Bauthus not to worry about what the Library wanted. Mayor Hamilton said he always worried about what it wanted. He disagreed with the suggestion that council did not try to get the best possible deal but agreed that the City gave up on that issue from this point on.<sup>261</sup>

### **City Council is told that the Mall will continue to leak and that the Collins Hall is a more economical alternative**

On July 20, 2009, Mr. Bauthus provided City Council with a report entitled "Future Location of the Library," in which he provided options now that the lease at Eastwood was coming to an end. In his report, he referred to the July 17, 2009, meeting he had with Mr. Nazarian and other representatives of Eastwood, where they discussed their proposal for the renewal of the lease, and indicated the following:

#### *Background*

For the past year, we have been looking at various options, however, the current stimulus programs have created some challenges in coming to a conclusion.

It had been decided that the Library should be an integral part of the multiplex and Council had decided that the multiplex be one of the priorities of the City ...

...

The lease that we presently have does not provide for any period of notification, however, it does provide for an overhold and the lease rate is the same as the last month of the current lease on a month-to-month basis until a new lease is negotiated or other arrangements made.

...

#### *Analysis*

The current conditions in the mall respecting water filtration and the HVAC problems make consideration of remaining in the mall problematic. The mall has undertaken work to remediate the water problem however, due to the construction of the mall and the parking roof it is unlikely that this can be completely fixed. There will probably be some instances, during periods of heavy rain, when there will be some infiltration ...

...

Presently, the City is paying \$8.79 per foot for 8544 [square ft.] of space plus taxes ... Under the proposal, the owner is requesting \$13 per square foot with an escalator of \$.50 per square foot per year which would bring the rate to \$15 in 2014 ...

The mall owner indicated at the meeting that there is presently a retail concern who is interested in the library space and is willing to pay not only more per square foot but also that [sic] the leaseholds necessary to accommodate the new venture. This apparently is one of the reasons why the mall is wanting the City's answer by July 31.

#### *Alternative Space*

In looking to accommodate the library over the short term until permanent quarters can be provided, we require space that can accommodate the floor loading requirements of a library which is significantly greater than other office usage ...

Given the size and requirements for the library, the possible sites in the community might be the former No-Frills building, former schools and the Collins Hall. In anticipation of using the Collins Hall as the library, we asked Cannon Design to do a cursory review of the facility in order to determine that the Hall is capable of the use and the magnitude of any improvements that would be required. The Collins Hall would work well with minimal upgrades ...

If we were to choose the Collins Hall as the alternate site for the library, there would be significant impact on the community because the Collins Hall presently is used for community functions and activities ...

...

#### *Financial/Budget Impact*

If we stay with the mall for the five-year period, we will have a significant increase of approximately 40% in the first year and an ongoing increase of 3% plus for each of the remaining four years. ...

*If the City decides to move to the Collins Hall, there will be the initial outlay of a \$180,000, however, there will be savings of approximately \$150,000 ... per year in that we will not be paying any lease payments for the library space ...*<sup>262</sup> [Emphasis added.]

Mr. Bauthus concluded:

The key issue here is whether or not to renew the lease for five years and take a chance that we will receive the funding for the multiplex that would have us then renting space in the mall for three years during which time the library will have vacated the mall space. If we do not receive funding, then we will have to find a home for the library for a minimum of five years and probably longer during which time we will be fundraising to construct the multiplex.

*In moving the library to the Collins Hall, there will ultimately be significant savings during the period that the library is in the Collins Hall, however, there will also be significant upset in the provision of services that were traditionally offered through this venue.*

At the time of preparing the report, we had not received the final draft of the lease nor the penalty clause. Therefore, the costs related to any penalty is not known as yet.<sup>263</sup> [Emphasis added.]

Mr. Collett testified that, when he read the report, he thought Mr. Bauthus wanted to put a quick end to all these negotiations, say simply that the City's hands were tied, and have the Library accept the situation the way it was. He did not think that Bob Nazarian would implement a solution to fix the leaks. Mr. Collett thought at the time that one possible solution would be to close down the rooftop parking and sell Mr. Nazarian the extra land. He agreed with Mr. Bauthus that, if the City chose the Collins Hall site for the Library, it would have a significant impact on the community. Mr. Collett testified that the Collins Hall was being looked at only as a temporary alternative because the City wanted to make sure that the building would not be permanently altered.\* Nevertheless, Mr. Collett agreed that that option would have saved money for the City and put an end to the Library's leak problem.<sup>264</sup>

• • • • •

\* At the time of the Commission hearings Foodland was occupying the Collins Hall. Mr. Collett testified that all the renovations could be removed and the building restored to its original condition.



Mayor Hamilton also agreed about the significant savings if the Library had been moved to the Collins Hall. He said that, at this stage in mid-July 2009, the council had been told that

- Eastwood would not agree to the price the City wanted;
- Eastwood would not agree to any language about the leaks which the City and the Library wanted;
- the leaks would continue; and
- there would be a five-year term for the lease (not the two-year term the City wanted), with a penalty for early departure.<sup>265</sup>

Mr. Bauthus admitted that he did not advise council in his report that the Library board would agree to a lease only on the condition that the Library would be allowed to get out of the Mall if there were any leaks. Mr. Bauthus had no explanation for that omission. He agreed that the only direction he was given by council was to ensure that the lease had a clause stating that Eastwood would be responsible for any damage caused by the leaks.<sup>266</sup> Mr. Bauthus also agreed that he had established it was possible for the Library to move into the Collins Hall, where there would be no leaks and where the City would save money.<sup>267</sup>

### **Despite the leaks and although there are options, City Council chooses to keep the Library in the Mall**

On July 20, 2009, during a closed session of council, Mr. Bauthus's July 20, 2009, report was discussed. The confidential minutes of this meeting reflect the fact that Mr. Bauthus provided a history of what had taken place with respect to the lease of the Library:

The CAO advised that we have a letter from the Mall indicating that the library must vacate as of October 31, 2009. The owner of the mall said that letter was a mistake, but actually the letter still stands.

The lease would have gone on a month to month basis; however we now have the termination letter.

We do not want a 5 year term lease.

...

A lease for space at the mall at \$150K per year for 2 or 3 years is too expensive.

They would look at an option where we would vacate prior to the 3 years, but there would be a penalty.

...

Mr. Fabris suggested that it would be difficult to prepare wording in the lease to address the leakage problem.

The reality is that you will never be able to attenuate the leaking problem when you have a flat roof with parking on it.

We cannot put up with the type of water leakage experienced in 2008.

Mr. Nazarian stated that he does have someone (retail) to enter into a long term lease at more than \$13 per square foot.

...

There is no trust in the landlord/tenant relationship.

...

Schools or Collins Hall may be able to accommodate.

...

Collins Hall is a major community centre ...<sup>268</sup>

Mr. Bauthus testified that his comment “you will never be able to attenuate the leaking problem when you have a flat roof with parking” probably related to what he had been told by Mr. Fabris. He did not speak to anyone from the Building Department about whether it was possible to fix the leaks on the roof.<sup>269</sup> Mr. Bauthus agreed that the Library’s position, that it wanted to be able to leave the Mall if there were any leaks, was consistent throughout the negotiations.<sup>270</sup>

Mr. Collett disagreed with Mr. Bauthus that the owner would never be able to fix the leaking problem because of the flat roof with parking on it. However, he admitted he did not ask whether Mr. Bauthus had obtained the opinion of the chief building official on these matters and said that Mr. Bauthus did not inform council whether the Building Department had been consulted. Mr. Collett further testified that there was no discussion at that meeting about the City taking action to address the leaking or to force Mr. Nazarian to fix the roof under the Property Standards By-law.<sup>271</sup>

Mr. Ewald testified that he was not aware that Mr. Bauthus had reached the conclusion that the leaks could not be completely fixed. He would have expected this conclusion to be brought to his, or his inspectors’, attention.<sup>272</sup>

The minutes record comments that were made by various councillors, among them:

Morrisette: we were in the Mall years ago just to support the mall. We should let Mr. Nazarian have the library space for the new tenant. Mr. Nazarian wants us to pay these exorbitant rates: lets not do it.

Reinhardt: the eviction notice gets you thinking of “where should we go”. He reacted to our reaction. He pulled back his “eviction notice”. He did not accidentally evict us. The price increase is not acceptable. A temporary home in the Collins Hall has always been a background idea. Flat roofs do leak. The Mall has more than normal problems with flat roofs. Cost to renovate Collins Hall is reasonable. Subsequent to the eviction, he gave us the July 31 deadline. A tight timeline is unacceptable. We should get out of his way re: his new rental tenant. Negatives about moving to Collins Hall and then move again to the new facility. Problems with customers with the move, should be manageable. Staying in the environment with Nazarian keeps us in the valley of indecision. Alternative venues are available. Impact on library users. Kiss the mall good-bye.

Rastin: what are our hydro costs? Hydro is included except for heat. In favour of getting out of the mall. Not in favour of pushing out the users of the Collins Hall. Are we going to spend \$180K fitting out Collins Hall. We should look for a long term solution for the library now.

Collett: agrees we should get out of the mall.

Patrie: at \$13 we should be running away from the mall. Nazarian’s proposal and the proposed lease are not consistent at all. There is nothing in the lease to protect us from water damage. Nazarian did not change his proposal after negotiating with the CAO.<sup>273</sup>

It is apparent that at the time, as was recognized by Mayor Hamilton and Mr. Bauthus in their testimony, five of the six councillors (Councillors Morrisette, Reinhardt, Rastin, Collett, and Patrie) were opposed to the Library staying in the Mall.<sup>274</sup> However, several councillors also indicated they were not in favour of using the Collins Hall as a long-term solution.

Mr. Collett testified that he was of the view that “enough is enough” and “it is about time we get out of that environment” where the problems included not only the leakage but also the resulting personnel issues and health and safety concerns.<sup>275</sup>

Mayor Hamilton was recorded in the minutes as saying:

Nazarian is risking a lot – we should say “here’s a two year lease” at the current rate. We have not taken a last stand as yet. We should notify Nazarian that we want it our way or the hiway. We have made big commitments to the library. We have included it in our Multi-plex facility. We need 60–90 days (funding answers needed). We do have an alternative. We are sick and tired of dealing with his antics.<sup>276</sup>

In Mr. Bauthus's handwritten notes of the meeting, he recorded the mayor as saying:

- same agreement.
- take it or leave it.
- two year lease.
- check taxes per square foot<sup>277</sup>

Mayor Hamilton testified that, by "take it or leave it," the City was going to take a stand on the agreement that it was proposing to Bob Nazarian and ensure that the agreement contained a provision "to deal with the water." He testified that he wanted to see something in the lease that would minimize the impact of the leaks on the Library because such a clause was not included in the previous lease. It was his evidence, however, that he did not support the Library's position that it should be able to get out of the Mall if there were any leaks. He wanted to see what else the City could find to address the problem. When pressed on what exactly he wanted, Mayor Hamilton clarified his position that he wanted the lease to include a clause requiring the landlord to make reasonable efforts to address the water in the hope that the Library would soon be out of the Mall and in the new multiplex. He agreed that there were all sorts of pitfalls in trying to enforce "reasonable efforts" clauses.<sup>278</sup>

The minutes then went on to record:

We are now going to give a lease back to Nazarian with our terms, and if it is not accepted by Friday, we will be spending from reserves to move to Collins Hall. That will be on the July 27 agenda.

If he does not sign it on Friday, we will still have legal tenancy. Our current rate is \$8.79 per sq. ft. ...

Mayor advised Chair of the Library Board that this discussion should remain within Council Chambers and not be shared with the library board until negotiations have been completed.<sup>279</sup>

When asked what instructions were given to Mr. Bauthus after this meeting, Mayor Hamilton testified that the minutes did not state the instructions, and he found that odd.<sup>280</sup>

Mr. Bauthus testified that his understanding following this meeting was that he should negotiate a lease with Mr. Nazarian which would include the discussed terms. He explained these terms as follows: the rate per square foot should be lower, the lease should be for a shorter term, and a provision on the water issues should be included. He confirmed that there was no vote on the direction given to him (to have the Library move out or otherwise). But he understood from the discussion at the meeting and from further discussions with the mayor that the Collins Hall was not a reasonable option and that he should negotiate a new lease. Mr. Bauthus explained that his understanding of the condition regarding leakage was that he should seek a clause whereby the Library would be allowed to vacate the Mall if the water problems persisted.<sup>281</sup>

Mr. Collett testified that he did not believe any direction was given to Mr. Bauthus other than to continue pursuing other locations. Mr. Collett agreed with the evidence of Mr. Bauthus that, in addition to trying to pursue other locations, he was directed to continue negotiating with Bob Nazarian because the City had no other option at that time. When asked why council did not consider temporarily moving the Library to another location such as the Collins Hall, Mr. Collett testified that, in addition to the cost factor, there were concerns over renovating a historic building as well as monopolizing a hall that the community used for various events.<sup>282</sup>

On July 22, 2009, Mr. Bauthus sent an email to Bob Nazarian and Mr. Fabris, copying Mayor Hamilton, Ms. Morin, and Virginia MacLean (the City solicitor) and attaching the Library lease that had been revised according to instructions from council.<sup>283</sup> These revisions included:

- rent at the same rate as then in effect at \$8.80 per square foot;
- a term of two years;



- property taxes at \$2.31 per square foot to reflect the current level of taxes on the Mall;
- a clause to deal with the potential water infiltration; and
- updated language to reflect the handling of the hydro and heating costs.

Mr. Bauthus ended the email by stating that he needed the lease to be signed by noon on July 24, 2009, in order to include it at council's next meeting. If it was not signed, council would invoke a provision from the 1989 lease agreement whereby the Library can "occupy the space at current rates in effect until other arrangements are made."<sup>284</sup>

On review of this email, Mayor Hamilton was pressed again about the nature of the instructions provided by council to Mr. Bauthus, particularly in light of the fact that, at the July 20 council meeting, five of the six councillors had expressed a desire for the Library to leave the Mall. Mayor Hamilton then changed his testimony and claimed that the instructions were not properly recorded in the confidential minutes. He testified that the final outcome of the discussions during the closed meeting and the instructions of council were as outlined by Mr. Bauthus in his July 22 email to Bob Nazarian. Mayor Hamilton had no explanation for why these instructions were given despite the views of the councillors as documented in the minutes.<sup>285</sup>

The revised lease proposed by Mr. Bauthus to Bob Nazarian contained a provision whereby the Library could vacate on 60 days' notice if water infiltration had "impacted" the Library's use:

26. Maintenance of the roof

(1) The Landlord will be responsible for the continuing maintenance of the roof so as to attenuate the infiltration of water caused by the elements and should the infiltration continue to the point that it impacts on the Tenants use of the facilities the Tenant has a right to terminate the lease on sixty (60) days written notice to the Landlord. Notwithstanding Paragraph 25 it shall be the responsibility of the Landlord to undertake repairs to the premises caused by the infiltration of water at the Landlord's expense.<sup>286</sup>

As recognized by Mayor Hamilton and Mr. Bauthus, although this clause was not as strong as what the Library was seeking (it wanted to be able to terminate the lease if there was any infiltration of water), it somewhat addressed the concerns of the Library board.<sup>287</sup>

## **Eastwood does not back down; Mr. Bauthus recognizes that if another tenant is available, the Library does not need to stay in the Mall**

On July 23, 2009, Mr. Fabris sent a letter to Mr. Bauthus concerning the proposed Library lease. In his letter, he indicated that

- the proposal was firm with respect to the \$13 per square foot, as there was a prospective tenant willing to pay more;
- the term of five years was non-negotiable;
- his client was "prepared to provide his best efforts to deal with water infiltration, and would be willing to have this as a clause in the lease; however, he would not agree to any compensation or early cessation of the Lease due to water infiltration";
- the Library could continue to occupy its premises after the end of the lease only with the approval of the landlord; if the lease was not signed, Eastwood would require the Library to leave at the end of its lease period; and
- Eastwood had been waiting for an answer from the City since the previous November; should the parties not be able to come to a mutually agreeable lease, Eastwood Mall would "approve the Tenant waiting in the wings."<sup>288</sup>

On July 23, 2009, Mr. Bauthus forwarded the revised lease to the council. He also advised council of the response he had received from Mr. Fabris, including the statement that, if nothing could be arranged, the Library was to move out of the Mall by the end of the lease on September 30, 2009. Mr. Bauthus also stated:

I indicated to Rene that once the decision to move is made there would be no backtracking irrespective of the issues. *I also indicated that if there is a tenant ready to move in then the reason for the library to be in the mall is no longer relevant.* The prospective tenant would prefer the space occupied by the library however there is other space available but more expensive to fit out. I suggested to Rene that 8.80 per foot for two years is better than nothing.<sup>289</sup> [Emphasis added.]

When asked about the statement in italic above, Mr. Bauthus said:

Well, I was looking at it from the perspective that the Mall – the library is in the Mall to provide a tenant occupying a major space, and if they have somebody in the wings that would be able to fill that space and pay rent, then the economic need for the library to be there is diminished significantly.<sup>290</sup>

With respect to the allegation that Bob Nazarian had a prospective tenant in the wings, Mr. Collett stating: “Hogwash. I didn’t believe it whatsoever.”<sup>291</sup> Mr. Bauthus shared this sentiment.<sup>292</sup> Mr. Collett also agreed with Mr. Bauthus that there would be no reason for the Library to be in the Mall if there were another tenant, but clarified that he thought Mr. Bauthus was simply calling Mr. Nazarian’s bluff.<sup>293</sup>

Mayor Hamilton testified that he was not surprised by Bob Nazarian’s response: the landlord was playing hardball.<sup>294</sup> Mr. Nazarian was not giving an inch and was being completely intransigent on the issue of the water infiltration.<sup>295</sup>

Mr. Bauthus’s correspondence to council makes it clear that the location of the Library was considered to be of vital importance to the Mall’s economic well-being.

### **City Council directs staff to continue to negotiate and foregoes the option of moving the Library to the Collins Hall**

On July 27, 2009, as a follow-up to the conversation he had on July 23, Mr. Bauthus received a letter from Mr. Fabris. The lawyer advised him that he had communicated with Bob Nazarian and that the owner was prepared to agree to a five-year term as long as the first three years of the term were fixed, with the last two years terminable on notice. Mr. Fabris noted that if the Library board wished to terminate the lease after three years, it had to buy out the balance of the remaining two years by paying 30 percent of the gross rent per year. That would have meant a penalty of about \$50,000 each year if the City vacated after three years. Mr. Fabris then advised that Mr. Nazarian was firm at \$13 per square foot for the rent unless the Library wished to be responsible for the HVAC system. As Mayor Hamilton recognized, the City got a slight movement on the term from Mr. Nazarian, but was not able to convince him to budge on the rent and the issue of the water infiltration.<sup>296</sup>

On July 27, 2009, Mr. Bauthus sent a memo to the mayor and the council providing them with an update on the Library’s lease negotiations, including the recent communications he had had with Mr. Fabris. Mr. Bauthus concluded his report by saying:

In summary *the mall has moved very little in terms of the lease and reiterated that the mall has a prospective client in the wings. That would suggest that there is very little reason for us to remain in the mall.*

In looking at other possible locations, the Collins Hall is the most economical at \$180,000 to refit to accommodate the library and the timeframe allowable.

Presently one of the main issues is the term and that hinges on the application for funding for the multiplex. If we get the funding we require short-term space for two years until the multiplex is built, if we don't get the funding we will require a longer period probably up to 10 years which would allow for a five year lease with the five-year option.

...

In summary we have an eviction notice to September 30, 2009 if a lease is not entered into and we have an alternate space that will accommodate the library however it will create some public issues and it will cost \$180,000 and up to 60 days to undertake the changes.<sup>297</sup> [Emphasis added.]

Mayor Hamilton agreed with Mr. Bauthus that, if the Mall had a prospective tenant in the wings, there was very little reason for the Library to remain in the Mall. He did not agree with locating the Library in the Collins Hall, but admitted that, of all possible locations, that one was the most economical.<sup>298</sup>

On July 27, 2009, council held a closed session to discuss the lease. Todd Stencil represented the Chamber of Commerce, and the Library board chair was invited to attend.<sup>299</sup> Mr. Stencil expressed concern over the effect of the Library's departure on the Mall and the impact on Collins Hall's use as a community centre. According to Mr. Bauthus, the chamber merely wanted to bring these two concerns to council's attention,<sup>300</sup> Mr. Collett, however, said that the chamber went further and advocated remaining in the Mall.<sup>301</sup>

During the closed session, Mr. Bauthus provided background on the recent negotiations with the Mall.<sup>302</sup> The minutes recorded the following statements he made:

He still wants a five year lease but will give us a three year fixed and allow us to vacate with a fixed cost of \$50K

The issue driving the term is the funding proviso that we build within 2 years.

We requested of Mr. Fabris, given that is an issue, let us overhold until December. Fabris indicated he did not have authority to grant it.

Could we live with a \$100K penalty?

After significant storm on Friday, there was only one section where water came in.

*The general perception is that the Mall needs us. The fact he has a tenant in the sidelines, seems unbelievable.*

We don't feel that \$13 per sq foot is fair ...

The Collins hall can be ready in 30 to 60 days.<sup>303</sup> [Emphasis added.]

Following certain remarks by councillors on the suggestion to move to the Collins Hall, Mayor Hamilton, as noted in the minutes, said:

Mayor – The Library Board has indicated they will not sign the lease. We control the purse strings. They control the lease. The Act states that the Board has the right, with the consent of the Council, to negotiate a lease. Council has only the financial control. Why are we negotiating the lease.

The buck does stop here. We either overhold the lease, or we move out the books, and lay off the library.<sup>304</sup>

Referring to the mayor's statement, "Why are we negotiating the lease," Mr. Collett testified that this issue was one of the few on which he agreed with the mayor. However, Mr. Collett agreed that it was the council that had directed Mr. Bauthus to go ahead with the negotiations, so Mayor Hamilton should have been aware of the approach Mr. Bauthus would take. Mayor Hamilton (disingenuously, in my opinion) explained that his statement was a rhetorical question. He surely knew that the council was doing the negotiating because of the Library board's long-held view that it did not want the Library to stay in the Mall.<sup>305</sup>



Mr. Bauthus confirmed that during the meeting of council, an issue was raised regarding what the City would do, or could do, if the Library board chose not to sign the lease ultimately negotiated.<sup>306</sup> Mr. Bauthus was directed to contact the City solicitor, Ms. MacLean, to ask for an opinion on what the legal effect would be if the Library refused to sign the lease.<sup>307</sup>

Mr. Collett testified that it was ludicrous to suggest that the Library staff would be laid off: there was no way the City would shut down the Library and lay off the staff. He stated that the direction given to Mr. Bauthus was the same as before: to continue negotiating with Bob Nazarian and, at the same time, to look at alternative solutions.<sup>308</sup>

Although the City's position in April 2008 had been that it would not make a decision about the Library staying in the Mall until it saw whether the roof was fixed, Mayor Hamilton agreed that, by the summer of 2009, City Council had decided that the Library was not going to move and that the City would negotiate the lease to keep it in the Mall. When asked about the presence of leaks and health and safety concerns, Mayor Hamilton testified:

Q. Rather, what happened was Council decided that they were going to negotiate and keep the library in the mall, right?

A. Pending the multiplex, yes.

Q. Despite the leaks?

A. Yes.

Q. Despite the health and safety concerns that had been made apparent over the years?

A. No, I wouldn't say that, sir.

Q. Well, you knew about them?

A. Yes, we did.

Q. So you made the decision despite them?

A. No, I wouldn't say that. We made a conscious decision to negotiate a lease that would ameliorate the leaks, and hence improving [*sic*] the health and safety issues, not making them worse, yes. So certainly we would have that in mind.

Q. So it is your evidence that the lease that was entered into went a ways towards fixing the leaks?

A. Well, that was the whole goal, yes.

Q. That was the goal, but did you get to the goal?

A. I believe we did, but we'll have to go through –

Q. All right, well –

A. There is a number of reports that suggest that it did get much better thereafter, yes.<sup>309</sup>

I cannot accept Mayor Hamilton's evidence. It is clear from the abundant documentary and oral evidence that the leaks at the Library never stopped. More important, it is clear that the City's assertion to the Library that it would ensure that the leaks were fixed before deciding to stay in the Mall was nothing more than a hollow promise.

The minutes then go on to reflect the following statements made:

CAO suggested that we stay until Dec 31 2009. He wants to get \$300 to \$400K from us. Are we prepared to spend \$4 to \$5 M on a new library facility when it is part of the new proposed multiplex.

We need to negotiate a reasonable rate and terms.

Why pay escalating rent for years and years. If we get the funding we need two years. Everything else is fixed. We move to Collins Hall.

If we don't get the funding, it will be at least 10 years before we can deals [sic] with a new library facility. . . .

*The reality of the mall has not changed.*<sup>310</sup> [Emphasis added.]

Mr. Bauthus testified that the last recorded statement was his. He explained:

A. I think the economic reality of the mall compared to the – I know I had mentioned it a couple of times to the Members of Council in terms of the need for the library in the mall.

Q. In other words, it was your view that it still needed the library?

A. Yeah, it was.

Q. And you told Council that.

A. And I told Council that on a couple of occasions.<sup>311</sup>

Mr. Bauthus may have believed that the Mall needed the Library. The mayor and the council were aware of his view. But Mayor Hamilton testified that the councillors who wanted to move out changed their view because they did not want the Library to move twice when the multiplex became a reality, and that he was of the same opinion.<sup>312</sup> Yet Eastwood either had a prospective tenant (and, hence, no need for the Library) or was bluffing to get more advantageous lease terms. Ostensibly, it might appear as if the motivation caused by the desire not to move twice was so strong that the council was not prepared to risk calling Eastwood's transparent bluff and would, as we shall see, submit to disadvantageous lease terms despite the Library's well-known desire to move out. I strongly suspect, however, that the real motivation was a desire to keep the Library in the Mall at all costs for all the reasons that had previously been advanced and articulated. The Mall needed the Library, and the City needed the Mall. It would remain there despite the Library board's strong objections and the unappealing terms of the lease.

I find it bizarre that none of the members on council suggested the use of the Property Standards By-law to get the Mall owner to fix the leaks, despite the fact that many members were present in October 2006 when the City issued a Notice of Violation to Eastwood, ordering it to fix the leaks. "I think people just forgot that it was issued back in 2006" is the explanation that Mayor Hamilton provided.<sup>313</sup> Given the unprecedented nature of that notice, the fact that the problems at the Mall persisted, and the owner's crafty intransigence, this collective amnesia is difficult to fathom. Was it wilful blindness, incompetence, or something else? I cannot tell.

Following this council meeting, Mr. Bauthus was instructed to continue negotiating with Eastwood as best he could. He testified that, given that Bob Nazarian had agreed on decreasing the duration of the lease, council was (blithely) hoping that Mr. Nazarian might give in again.<sup>314</sup>

### **Council is advised it should not be negotiating the Library lease or signing it on behalf of Library**

On July 29, 2009, the City received an opinion from Ms. MacLean on "what would happen if the council struck a deal with the mall to renew the lease and the Library Board refused to execute the new lease? Could the City execute the lease and insist that the Library occupy the space at the mall." Ms. MacLean advised the City that

- the lease was between the board and the landlord, but the Library board could not lease land for the purpose of the Library without the consent of the council;
- the Library board should have been negotiating the lease;

- if the Library board authorized the negotiations on its behalf, the position should have been reported first to the board and then to the council, not the other way around. Council had the final decision, and the lease should have stated that the execution by the board was subject to the consent of the council so that there was no misunderstanding by the landlord;
- the council could not sign the lease for the Library board because the approval process was the other way around; and
- the Library board should have made a decision on the lease and sought the council's approval immediately.<sup>315</sup>

Mr. Bauthus testified that he understood Ms. MacLean's opinion to be that the City could not sign the lease on behalf of the Library or force the Library to occupy the space if it refused to sign the lease. At this time, the Library was threatening not to sign the new lease because of the leaks.<sup>316</sup> However, the City Council ignored this legal advice and not only signed the lease with Eastwood but forced the Library to occupy the space, despite the relentless leaks and the ongoing health and safety concerns.

### **City Council's decision leads to the resignation of the chief librarian**

On August 7, 2009, Ms. Morin, chief librarian, submitted her resignation to the Library board, effective August 28, 2009.<sup>317</sup> The evidence before me is uncontroverted that Ms. Morin resigned because of the council's refusal to relocate the Library despite the continuous leaks.<sup>318</sup>

I find it disturbing that the resignation of the Library's chief administrative officer did not motivate the City to reconsider its position.

### **Conclusion: The City's decision to renew the lease was always motivated by its determination to keep the Library in the Mall**

The City's actions ran counter to legal advice and the strongly and justifiably held view of the Library board. The owner had a prospective tenant. If that was not true, then the City had the upper hand in its negotiations with the owner, made even stronger by the fact that it had a powerful tool in its Property Standards By-law. Councillors had previously expressed their view – clearly – that the Library should move out. They had been told that the owner was likely playing a game with them. The health of the public and Library staff was an issue; the condition of the Library inventory was in jeopardy. Another location was available, at least on a short-term basis, until the multiplex situation was determined. However, these valid considerations could not sway the mayor and council in their determination to keep the Library in the Mall.

### **July–August: Scotiabank stops paying rent as a result of the unpaid expenses incurred because of the leaks**

Following its letter of February 6, 2009, Scotiabank sent Bob Nazarian and Mr. Fabris several letters for the reimbursement of the expenses incurred for repairs caused by the water infiltration. Some of these letters were answered and others were not.

On June 26, 2009, Scotiabank reiterated its request for reimbursement of \$113,889.72 for these expenses. Bob Nazarian was also informed that, since February, additional costs had been incurred in relation to repairs.<sup>319</sup>



On July 2, 2009, Scotiabank sent a letter to Bob Nazarian enclosing the list of costs and expenses, together with supporting invoices and quotations, for repair work and remediation required by the leaks. Mr. Nazarian was also informed that further remediation for an incident that took place in May would total approximately \$44,000 and that reimbursement would be sought. Scotiabank provided Mr. Nazarian with another copy of Bruce Caughill's September 2008 report (initially shared with him on September 29, 2008) and asked that he address the issues laid out in section 6 of that report because the bank remained concerned by the statements there.<sup>320</sup> (Mr. Caughill had noted that the leaks were persisting, the repairs were deficient, and water had caused corrosion damage to steel which should be investigated to verify the integrity of the structure.<sup>321</sup>)

On July 23, 2009, Scotiabank sent another letter to Bob Nazarian, requesting that \$155,726 be paid, based on the final invoices that it had up to that point.<sup>322</sup>

On July 27, 2009, Mr. Fabris responded to Scotiabank's July 2 letter, advising that

*in our investigation there was no mold that was found.*

I find that the work proposal is excessive; also my clients are prepared to do the work themselves with the local contractor at a much lower cost.<sup>323</sup> [Emphasis added.]

Indeed, when asked about the investigation referred to in his letter, Mr. Fabris testified:

Q. And your response to that is that your investigation, which is the M.R. Wright; correct?

A. The M.R. Wright and the staff from the mall had gone in to see if there was any mould.

Q. Well, the staff in the mall are not environmental scientists; correct?

A. No, but they can see mould growing on a wall.

Q. Well, you had these Environmental Assessments done by Pinchin to find out the air quality, that is what they are looking at, correct?

A. The staff at the bank was seeing mould in areas, what they qualified as mould, and on certain occasions that proved not to be mould.

Q. In any event, you'll confirm for me that the M.R. Wright report was dealing with Zellers; it wasn't dealing with the Bank of Nova Scotia?

A. No, but the staff did go in and see where areas of concern were.<sup>324</sup>

Mr. Fabris's letter is puzzling. The M.R. Wright mould investigation and assessment was conducted at Zellers and not at Scotiabank. It was conducted in August 2008 and not in 2009.<sup>325</sup> Eastwood did not request an investigation of Scotiabank until November 2009.<sup>326</sup> In any event, the mould investigation by maintenance and M.R. Wright staff could not be an adequate substitute for the expertise of trained professionals in mould detection.

On July 28, 2009, Scotiabank gave notice to Bob Nazarian that, since it had not been reimbursed for the claims relating to the water damage, it would immediately commence deducting the amount owed from its rent in accordance with the lease addendum of July 24, 2006.<sup>327</sup> This letter did nothing to change Mr. Nazarian's conduct with respect to the leaks.

On August 4, 2009, in response to Scotiabank's letter of July 23, Mr. Fabris sent a letter to Scotiabank advising that it should claim the amount from its insurer and that Eastwood would not be paying the amount.<sup>328</sup> The next day, in response to Mr. Fabris's letter, Scotiabank sent a letter to Bob Nazarian and Mr. Fabris stating that its position was that it was up to the landlord, and not Scotiabank's insurer, to cover these costs pursuant to section 7 of the lease.<sup>329</sup> Scotiabank continued to offset from its rent the amount it was owed.<sup>330</sup>

## July–August: Bob Nazarian continues to try to get money from the Royal Bank, but not to fix the leaks

On July 29, 2009, Jim Davison from the Royal Bank, the administrator of Eastwood's mortgage, emailed Bob Nazarian, asking him about financial variances and a written plan or capital budget for the repairs to be made to the Mall. Mr. Nazarian did not recall getting this email but agreed it was apparent that the "bank was still on [his] case."<sup>331</sup>

On August 6, 2009, Bob Nazarian sent Mr. Davison a report entitled "Algo Mall and Hotel Improvements Project – Infrastructure and Hydro HVAC Project." The report explained the Mall's "future improvement and requirements," which he sought to finance by the release of the reserve fund he had been required to pay into since buying the Mall. Mr. Nazarian stated it was "[v]ery much possible" that this report was in response to Mr. Davison's July 29 request.<sup>332</sup>

Mr. Nazarian indicated in his letter that Eastwood had significant problems with the roof in 2008. By September 2008, however, as I have described, Bob Nazarian had stopped trying to fix it. He simply maintained it by attempting to remove and restore caulking that had failed and applying new caulking in new cracks and leaks.

Bob Nazarian advised Mr. Davison that he was in the process of improving the Mall and recruiting new tenants. He listed the following improvements, none of which included fixing the leaks: HVAC system replacement; reconstruction of provincial government offices; preparation of new offices for the federal government; painting of Mall and Hotel; installation of a new hotel sign; and renovation of the interior of the Mall.<sup>333</sup>

Mr. Nazarian testified that he did not include the roof in the list of improvements because fixing it needed "much more money" than what was in the reserve fund. He had asked previously for money to fix the roof and been rejected. He was no longer trying to get financing to fix the roof in 2009. According to him, the leaks were in a "much better situation" in 2009. He stated the leaks "were 90 per cent clogged," regardless of what Scotiabank said. He nevertheless admitted that this view was not shared by the City in September 2009.<sup>334</sup>

On August 20, 2009, Mr. Davison emailed Bob Nazarian, advising him that the master servicer (who acted on instructions of the investors) had agreed to accept an early payout of the mortgage without a penalty.<sup>335</sup> Mr. Nazarian saw that development as very good news.<sup>336</sup>

## July: Levon Nazarian misleads lenders and potential tenants into thinking that the roof has been resealed

Despite Bob Nazarian's decision in September 2008 not to make a major expenditure on fixing the roof, Eastwood continued to advise lenders and potential tenants in July 2009 that it had invested money to do so.

In July 2009, Levon Nazarian prepared for lenders – or anyone else who wanted information on the Mall, including potential tenants – a sales brochure similar to the one he had prepared for potential purchasers, but without the financial information. Under "capital improvements," he wrote: "Several major capital investments were made, including ... Upgrading and resealing of the entire roof of the mall." By this description, Levon Nazarian testified, he meant "changing all the expansion joints ... and all the sealing that was done on the roof." He claimed that he was referring to the work his father and the Mall's forces did in 2008 and 2009. He testified that he did not know the difference between caulking where there were leaks and putting a sealer or sealant on the entire roof. He prepared the wording in the brochure himself, without consulting anyone. When pressed, he admitted there was a difference between fixing the cracks and covering the entire surface of the roof with a sealant. He testified that he wanted readers to think that "we've upgraded the roof, that we've done work to the

roof, that we enhanced the roof.” He disagreed that one might conclude by reading his brochure that he wanted readers to think that the entire roof had been resealed, instead of just the leaks being re-caulked or resealed.<sup>337</sup>

I do not accept Levon Nazarian’s evidence. It is clear to me that both Bob and Levon Nazarian wanted to convince everyone reading these brochures that they had spent money fixing the entire roof, leading them to believe that water infiltration was an event of the past.

## **August: Library lease – City Council approves a lease that does not protect the Library’s interest**

### **The City continues to negotiate for a lease with Eastwood**

A public meeting of City Council was held on August 10, 2009. Mayor Hamilton is reported as saying, “[W]e are still negotiating with the mall about the library lease and as such cannot disclose details until this process is complete. Our staff is working feverishly to attempt to secure a lease with the mall.”<sup>338</sup>

Mr. Collett testified that he expected Mr. Bauthus to be negotiating a short-term lease with the guarantees that the Library board had requested.<sup>339</sup> Indeed, Mr. Bauthus testified that he communicated mostly with Mr. Fabris in this effort.<sup>340</sup> Mayor Hamilton testified that the Library board was not involved in the immediate discussions.<sup>341</sup>

### **The City concedes on all terms, including the water-infiltration provision**

On August 12, 2009, Mr. Bauthus sent an email to Mr. Sennett, who was apparently acting on behalf of Bob Nazarian, copied to Ms. MacLean and Mayor Hamilton. He attached an updated Library lease that provided

- a rent of \$12.50 per square foot, almost as high as the \$13 that Eastwood had been seeking;
- a term of five years with an exit after three years with a penalty (approximately \$50,000 per year), which is what Mr. Fabris had suggested, instead of a two-year lease with an option to renew for two years, which had been the City’s prior position; and
- a 12-month notice, instead of a 60-day notice as originally sought, if any water leakage interfered with the Library operation.<sup>342</sup>

Mr. Bauthus testified that council had not approved these revised terms but that he had discussed them with the mayor. The weaker position was a reflection of these discussions.<sup>343</sup>

Mayor Hamilton’s evidence was different. He testified that he did not know who told Mr. Bauthus that these terms were acceptable and that he certainly did not give him the instructions. Ultimately, the deal had to be approved by council. However, when he was asked why these concessions were made regarding the rent, the term, and the water, Mayor Hamilton testified that it was so the Library could remain in the Mall until it would move into the multiplex. When the evidence of Mr. Bauthus was put to him (that Mr. Bauthus had discussed these terms with him), Mayor Hamilton testified it was possible but that the lease had to be ratified by council in any event. When asked again whether he was also trying to keep the Library in the Mall to keep the Mall economically viable, he testified that it was part of the reason, but that his goal was to make sure the Library did not move more than once.<sup>344</sup>

It is apparent that Mayor Hamilton was intimately involved in this matter, and I have no reason to question Mr. Bauthus’s evidence on it. He was forthright throughout his testimony on this issue, admitting that indeed the City did not advocate the Library’s position but simply wanted to negotiate a lease to allow the Library to stay in the Mall.



### Eastwood pushes back on water-infiltration provision

On August 21, 2009, Mr. Fabris sent a letter to Mr. Bauthus in which he advised him that the parties were in agreement with all the items in the lease except the clause dealing with the maintenance of the roof. Mr. Fabris proposed the following language:

The landlord will be responsible for the continuing maintenance of the roof so as to attenuate the infiltration of the water caused by the elements and should the infiltration be as severe as that experienced during the 2008 calendar year, or continues to the point that it substantially impacts on the tenants use of the facilities, the tenant has the right to terminate the lease on twelve months written notice to the landlord.<sup>345</sup>

As recognized by Mr. Bauthus, this wording was a further weakening of the water-infiltration clause, particularly since 2008 was the worst year the Library had experienced in terms of leaks. This clause would ultimately be agreed to by council and be part of the executed lease.<sup>346</sup>

### City Council approves “weak” lease and asks the Library board for approval

On August 24, 2009, Mr. Bauthus provided a report to council recommending the execution of the five-year lease with Eastwood, “which will allow the library to remain in the existing premises for a further five-year period.” In his report, under the heading “Responsibility for water infiltration,” Mr. Bauthus wrote:

With the design of the parking area there are issues of water leaking into the library and in 2008 the water leakage was significant and very interrupting to the operation of the library. The landlord has undertaken to remediate this by upgrading the maintenance of the roof. In view of this a section was introduced into the lease to recognize that the landlord will fix and/or replace structure, walls, ceiling tiles etc. as a result of leaks and should these leaks become of the magnitude of those in 2008 the library then has the right to give 12 months notice to terminate the lease because of water infiltration.

This will allow the library to address an escalating issue of water infiltration and allow time to work with the City to search out alternate premises to house the library.<sup>347</sup>

Mayor Hamilton admitted that this clause was a significant concession by the City on behalf of the Library board from what the Library board had sought from the outset of negotiations. The Library could get out of the lease on 12 months’ notice only if the leaks were as bad as those in 2008 or if they significantly affected their operations. That was not what the Library wanted. Mayor Hamilton said that the City was effectively agreeing to have the Library stay in premises where there had been very bad water damage for the previous 30 years. He testified that this clause was a “stopgap measure”: the Mall owner was implementing a maintenance program to address those issues, and the City was looking at alternative premises in the multiplex.<sup>348</sup>

However, as admitted by Mr. Bauthus, the lease did not include a clause covering maintenance of the roof. Bob Nazarian and Mr. Fabris had made repeated oral promises to Mr. Bauthus since his return to the City in 2007, none of which were ever honoured.<sup>349</sup>

I also note that Mr. Bauthus did not report the Library’s position to council, which was that it wanted to be able to leave the Mall if there was any leakage. Indeed, the clause in the lease was significantly different and less beneficial for the Library.<sup>350</sup>

Mr. Bauthus concluded his report by saying:

While the rate at \$12.50 per square foot is higher than the current rate in effect it is reasonable *when considering the location and the impact on the community*. The key issues related to the HVAC and water infiltration have been addressed in the new lease to ensure that the landlord is aware of its responsibilities and to provide flexibility in the event that water infiltration continues to the extent that it impacts on the operation of the library.

*The library will continue its operations in the mall location which is a win-win for both the mall and the City and when we are able to undertake the construction of the multiplex which is to include the library we will have the time to negotiate an appropriate exit time frame and cost when the library is ready to move. In the meantime the mall remains a very convenient location for the library to serve the community of Elliot Lake.<sup>351</sup> [Emphasis added.]*

Mr. Bauthus explained that it was a “win” for the Mall because it retained a major tenant and would have no vacancy; and that it was a “win” for the City because the Library would continue to operate without interruption, additional cost, and the need to move until the multiplex was constructed.<sup>352</sup> Mayor Hamilton also agreed it was a “win-win” situation.<sup>353</sup>

I disagree for the following reasons:

- The City was committed to stay in the Mall for a minimum of three years, following which it could leave only with a penalty of approximately \$50,000 per year.
- The rent agreed to was not only higher than the current rate but also more than 40 percent higher.
- Had the Library moved to the Collins Hall, the City would have saved money.<sup>354</sup>
- The City had no indication from the federal government that it would get the grants for the multiplex; ultimately, it did not get them.
- It was a “win” for the Mall and the City only if there was no other tenant; Eastwood said there was one. If there was no other tenant, the City was giving up an important negotiating advantage since it clearly would have had the upper hand and could have obtained much more advantageous terms. As I previously pointed out, it was simply not willing to call Eastwood’s bluff.
- The Library was left with a weak water-infiltration clause that would be triggered only in the event of a water infiltration similar to the summer 2008 debacle, and even then this clause was encumbered by a 12-month notice requirement.

On August 24, 2009, City Council discussed the Library lease issue in closed session. As reflected in the minutes, the deputy mayor explained that a lease had been negotiated on behalf of the Library and that it was recommended that the Library board execute the lease.<sup>355</sup>

Mr. Collett testified that he did not agree whatsoever with the five-year term of the lease, the lack of a guarantee to fix the leaks, and the absence of compensation for damage caused by the leaks. Unfortunately, he was in the minority. Direction was given by council to staff to forward the lease to the Library board for its approval.<sup>356</sup>

## **August: The City realizes that no follow-up was done on the 2006 Notice of Violation**

The day after council approved the Library lease, on August 25, 2009, Paul Officer, the fire chief, sent a handwritten note to Mr. Ewald on a copy of an email that Bruce Caughill had sent to Mr. Ewald on September 18, 2008 (on which Chief Officer had been copied). Chief Officer’s note read, “Bruce has this moved forward?”<sup>357</sup> In the September 2008 email, Mr. Caughill had informed Mr. Ewald that his services had been terminated by Eastwood in relation to the 2006 Notice of Violation and that he had not performed any inspections or submitted a report to Eastwood. Mr. Caughill had also advised Mr. Ewald that he had recently prepared a report for Scotiabank on the roof leaks.<sup>358</sup> Chief Officer testified that he would have been prompted to communicate with Mr. Ewald on August 25 because he probably heard that the Mall roof repairs had been completed.<sup>359</sup> It is unclear what those repairs would have been because, as I indicated above, Bob Nazarian had not undertaken any new repairs except the recaulking of the joints.

Mr. Ewald recalled receiving this note. It was his evidence that this email began the process that led to the order he issued on September 24, 2009.<sup>360</sup> He testified that, following the receipt of the August 25 note, he had several conversations with Chief Officer about the issue and how they would approach the situation. This discussion led to a package of documents, including the Notice of Violation and the 2006 correspondence between Mr. Bauthus and Mr. Nazarian, being put together by Chief Officer and sent to Mr. Bauthus and Mr. Ewald on September 23, 2009.<sup>361</sup>

Mr. Ewald did not conduct an inspection of the Mall between August 25 and September 23, despite having been advised by Chief Officer of the 2006 Notice of Violation and that Eastwood had terminated Mr. Caughill. He did, however, testify that he read the materials in the file about the 2006 notice – and that there was very little in that file.<sup>362</sup> Syl Allard's inspection report to Tom Derreck, dated October 23, 2006, which outlined the potential structural problems, was not in the Building Department file he reviewed; it was located only after the Mall collapse, in a file kept by the chief administrative officer.<sup>363</sup> He also testified that he had not seen the Notice of Violation until 2008 or 2009.<sup>364</sup> The letter sent by Tom Turner (the mall manager) to Mr. Derreck (the chief administrative officer) on November 13, 2006, about the Notice of Violation was not in the file he had reviewed when he first started working for the City.<sup>365</sup>

Whether or not these documents were in the Building Department file in August 2009, Mr. Ewald ought to have attempted to locate the investigation report and conducted an inspection immediately after receiving Chief Officer's email of August 25, 2009. Instead, he waited one month to act.

Mr. Bauthus testified that, as of August 25, 2009, he was not aware of the 2006 Notice of Violation or this communication from Chief Officer.<sup>366</sup> I accept his evidence. It appears that Mr. Ewald and Chief Officer did very little after Chief Officer's email other than to speak to each other.

In the meantime, the roof continued to leak. Indeed, on September 21, 2009, the Zellers manager reported to Hudson's Bay that 13 areas were leaking in his store, which had a total of 43 wet tiles.<sup>367</sup>

## **September–December: As the leaks continue, the City issues an Order to Remedy, Robert Wood deems the Mall structurally sound, and City Council ignores the Library board**

### **September–October: Library lease – the council pressures the Library to sign the lease and the mayor and two councillors try to dissolve the Library board**

On September 11, 2009, Mr. Bauthus met with Mayor Hamilton, Councillor Doug Soulière, and Councillor Scot Reinhardt regarding the Library lease. In his notes of the meeting, Mr. Bauthus wrote:

Can we dissolve library under the Act.

Meet with Al Collett.

Talk to Pat McGurk.

B – note on writing up staff up to constructive dismissal.

Letter to Kiviaho re issues from Rick.

[?] Monday 9:15 meet with Al on Monday before Council.<sup>368</sup>



As of September 11, 2009, the lease had not been signed because the Library board refused to do so. It was due to expire on September 30. Eastwood had also informed the City that the Library would have to vacate the premises if the lease was not signed by September 30. Mr. Bauthus testified that the discussion with the mayor and the two councillors related to the possibility of dissolving the Library board because of its refusal to sign the lease. Mayor Hamilton and Councillors Soulière and Reinhardt wanted to put in place a new board that would agree to sign the lease because, as Ms. MacLean had advised the City, the board had to sign it. Mr. Bauthus testified that he explained that the Library board was appointed for the same term as council and that it probably could not be dissolved.<sup>369</sup>

On September 8, 2009, Ms. Croxson, chair of the Library board, sent an email to members of the board enclosing the lease that had been negotiated by the City. She outlined her concerns over several provisions of the lease, including the water-infiltration clause (clause 26).<sup>370</sup>

On September 14, 2009, Councillor Reinhardt sent an email to Mayor Hamilton under the subject line, “Re: lease, what do you think? before I send this,” which he intended to send to Ms. Croxson in response to her September 8 email. Mr. Reinhardt took issue with Ms. Croxson’s position and the way the Library board had been dealing with the lease. He wrote, in the email he proposed to send:

On that note, it is obvious that you and a couple of other trustees are meeting and talking about issues that are coming before the Board ahead of the regular meetings. You actually made references yourself to such communication in the last few meetings. Meeting outside of the regular Board meetings with individual trustees is not technically a bad thing, in and of itself. But I am getting a growing sense that you are working an agenda of your own that includes pulling the Board further and further away from the long-standing relationship that it has had with Council. Again, I am not pleased with this move. Council has a highly interdependent relationship with the Library Board. We have shared HR services, planning services, the use of City equipment, finance services and so on, for many years. More importantly we essentially fund the library. To see the Board discussing this relationship in negative terms is disturbing to me and I will be discussing it with the Mayor and Council. I cannot remember the City ever interfering with the day-to-day functions of the library. In fact Fred and his staff have been extremely supportive of the library. Fred fights for library issues and their budget with equal enthusiasm and on equal footing with all the other budgets in the city. So I am not only confused about all the negativity toward the city but offended by it.<sup>371</sup>

Councillor Reinhardt eventually sent the email to Ms. Croxson. Mr. Collett testified that he was given a copy by Ms. Croxson, who was very upset by Mr. Reinhardt’s accusation that she was doing things and meeting with the board improperly. Mr. Collett testified that he did not think that Councillor Reinhardt understood the role of the Library board or the fact that council had no control over the board. Mr. Collett did not agree with the views expressed by Councillor Reinhardt, particularly with his claim that the City was not interfering with the Library’s affairs. He explained that he was made aware of a number of times when the chair was called into Mr. Bauthus’s office and advised that the board should accept the lease. Mr. Collett testified, and I accept, that Mayor Hamilton and Councillors Soulière and Reinhardt were the ones having private meetings and not sharing information with the Library board.<sup>372</sup>

There is no doubt that, as the deadline of September 30, 2009, approached, there was a great deal of anxiety at city hall about the execution of the Library lease. This issue could have been completely avoided had council simply acquiesced to the Library board’s wishes to have a dry location and moved the Library temporarily to the Collins Hall.

### **The City claims the Library lease includes a number of points in its favour**

On September 25, 2009, Mr. Bauthus sent an inter-office memo to the mayor under the subject line “Key points of the new lease,” in which he stated: “At this point we would wish to complete the lease as quickly as possible without further examination on the part of Eastwood as there are a number of points that had been created in our favor.”<sup>373</sup> Mr. Bauthus agreed that, despite this message, among those issues identified as important in his July 22, 2009, email to Eastwood, only one was negotiated in favour of the City: a provision which provided that the City would pay the proportionate amount of taxes for the space occupied and not an inflated amount.<sup>374</sup>

Mr. Bauthus wrote in his memo, under the heading “Responsibility for water infiltration”: “The City now has wording that will allow us to cancel the lease on 12 month notice if the water infiltration problem continues on the same level as in 2008. It recognizes that the landlord is responsible for the repairs to the facilities however not to the books.” Mr. Bauthus admitted that the water-infiltration clause represented a significant retreat by the City from what the Library wanted – and for this reason the Library board refused to sign the lease.<sup>375</sup> Mr. Bauthus also informed the mayor in his memo that if the lease was not signed by October 1, some five days later, the Library might be locked out. He did not, however, consider that a real possibility.<sup>376</sup>

### **The Library board refuses to sign the lease before an independent legal review**

On September 29, 2009, Mayor Hamilton emailed Ms. Croxson, copying Councillors Soulière, Reinhardt, and Collett and Mr. Bauthus. The mayor inquired about the Library’s status regarding the review of the lease (since the lawyer approached by the Library could not do the review owing to a conflict of interest) and urged a timely response because the lease expired in two days. Ms. Croxson replied that the Library was seeking a new lawyer, and, until the lease was reviewed independently, the board would not sign. Mayor Hamilton subsequently asked for a timeline for the review and reaffirmed the City’s offer to discuss the matter with the board and Ms. MacLean.<sup>377</sup>

The next day, September 30, Mr. Bauthus sent an email to Mayor Hamilton and Councillors Reinhardt, Collett, and Soulière in which he indicated that he had spoken to Ms. MacLean, who agreed with him that the City was not authorized to execute the lease on behalf of the Library board. He also advised them that he instructed staff to provide Eastwood with a cheque, pursuant to the holdover provisions of the lease, in order to prevent a lockout by the Mall.<sup>378</sup>

Subsequently on that day, Councillor Reinhardt responded to Mr. Bauthus, writing:

Failing to reach a speedy agreement by the Board, in terms of the lease, would constitute a breach of their duty as it pertains to the act and its defacto [*sic*] and implied agreement with both the rate payers and the appointing body.

I am going to suggest that if the board is not prepared to demonstrate in writing their ability and intention to reach a decision on a lease that the city take the necessary measures to relieve the board of their duties and to operate the library outside of the Act.<sup>379</sup>

Mr. Bauthus did not share Councillor Reinhardt’s point of view and believed that the board members were acting in good faith and fulfilling their duty as they saw it. He did not believe that the board was acting against the interests of ratepayers.<sup>380</sup>

Later on September 30, Mr. Bauthus responded to Councillor Reinhardt’s email at Mayor Hamilton’s invitation. He wrote that the City had to allow the situation to proceed to a logical conclusion and that, to date, there had been no specific loss to the municipality – the Library was still open. Mr. Bauthus indicated that council had the authority to approve the allocation of funds for legal review and, if this approval was granted, it would

be up to the board to negotiate for the continued use of the premises until an agreement was reached. Later still, Councillor Reinhardt wrote again to Mr. Bauthus, indicating that the difference in their opinion was that Mr. Bauthus thought it better to wait for a loss or closure before acting. He also indicated that, in his assessment, the chair was steering the Library board in a poor direction on the lease and other critical matters. Councillor Reinhardt indicated that waiting could cost taxpayers a lot of money and the possible closure of the Library.<sup>381</sup> Like Mayor Hamilton, he held the view that the Library board should be forced to bow to the will of council.<sup>382</sup>

Mr. Collett testified that he did not agree at all with the opinion of Councillor Reinhardt and was shocked that he would go so far as to suggest getting rid of the Library board. He testified that he believed the board was doing its due diligence and that its motivations and intentions were legitimate.<sup>383</sup> He also testified that he believed Mayor Hamilton was trying to force the chair's hand to sign the lease.<sup>384</sup>

I agree with the evidence of Councillor Collett and Mr. Bauthus. I also find it odd that not all councillors were copied on these emails. It was council that had made the decision to agree to the lease and submit it to the Library board. Mr. Bauthus acknowledged that all members of council should have been copied.<sup>385</sup> The pressure on the Library board from the City may well have originated, to a great extent, from Mayor Hamilton.

### **Mayor Hamilton tries to force the Library board's hand in signing the lease**

The next day, October 1, 2009, Mayor Hamilton sent another email to Ms. Croxson, copying Councillors Soulière, Reinhardt, and Collett and Mr. Bauthus. He advised her that the lease had expired and formally requested a meeting with her the next day. Later in the day, Mayor Hamilton wrote again to suggest an alternative date (October 5) because Ms. Croxson could not attend the following day. He reiterated the urgency of the matter.<sup>386</sup>

On October 2, Ms. Croxson replied that she was unavailable to meet at the suggested new date and was aware of the urgency of the matter. The board, she said, needed to do its "due diligence to protect the interests of the Library." Mayor Hamilton responded, asking whether another board member could attend in her place and posing several questions regarding the Library's lawyer – the advice obtained, and the funds used by the board to pay its lawyer.<sup>387</sup>

On October 3, Mayor Hamilton sent yet another email to Ms. Croxson, asking for a reply to his previous questions.<sup>388</sup> He wrote again on October 4, this time stating that he assumed the meeting set for the following morning would not take place and asking for a reply to his questions.<sup>389</sup> Later in the day, Mayor Hamilton wrote to Mr. Bauthus, with a copy to council, asking him to research legal remedies that might be available to obtain a response from the board to his questions.<sup>390</sup>

On October 6, Mr. Bauthus replied that he would consult with Ms. MacLean and with the Ministry of Municipal Affairs and Housing.<sup>391</sup>

### **Eastwood allows the Library to stay in the space despite no lease**

On October 2, 2009, Mr. Fabris sent a letter to Mr. Bauthus, informing him that the lease had ended on September 30. He wrote that he assumed the City would be using the carry-over period of the expired lease and that, when the new lease was signed, the new rate would be retroactively applied to the period carried over.<sup>392</sup> Mr. Fabris stressed that the new lease needed to be signed forthwith. Mr. Bauthus testified that when he received this letter, he was relieved because the Library's doors would not be locked.<sup>393</sup>



## September 24–25: Three years on, the City again takes action against the Mall over the leaks

### Chief Officer informs the chief administrative officer of the outstanding 2006 Notice of Violation; Mr. Ewald is not overly concerned

At the same time that the mayor and the City councillors were engaged in lease discussions with both the Library and Eastwood, and the Library was potentially facing eviction on September 30, 2009, the outstanding 2006 Property Standards Notice of Violation and *Fire Code* Order were once again brought to the fore.

On September 14, 2009, Chief Officer directed Darren Connors, a firefighter, to check whether the missing fireproofing from the steel beams had been corrected. Mr. Connors reported back the next day, stating that that it appeared to him that no attempt had been made to fix the problem.<sup>394</sup>

As mentioned, on September 23, 2009, Chief Officer sent an email to Mr. Ewald and Mr. Bauthus attaching a package relating to the 2006 Notice of Violation. The 19-page package sent by Chief Officer included the 2006 Notice of Violation issued by Mr. Allard; Mr. Derreck's letter of October 30, 2006, to Bob Nazarian; Chief Officer's letter of November 1, 2006, to Mr. Nazarian; the complaint made by Mr. Allard to the Fire Department; Mr. Turner's letters of November 13, 2006 (to Mr. Derreck) and November 28, 2006 (to Chief Officer); and Bruce Caughill's September 18, 2008, note to the City.

Mr. Ewald acknowledged that council in October 2006 had taken extraordinary steps in the circumstances.<sup>395</sup> He also agreed that the direction from council (which was unusual) indicated that councillors were very concerned as a result of the inspections that showed breaches of the various laws and by-laws related to the structural integrity of the building and the health and safety of the public.<sup>396</sup> He realized that no program of inspections and staged approvals had been carried out by the City as had been contemplated three years earlier.<sup>397</sup> He testified that he knew that

- no repairs had been reported to the City in the prior three years;
- no review of the Mall had been carried out by a professional engineer, and no report had been provided to the chief building official certifying the acceptability of the existing condition;
- in 2006 there had been serious leakage problems that had to be fixed and that raised the potential of structural damage; and
- Mr. Allard thought that the leakage problems were serious enough that they could, potentially, have caused structural damage.<sup>398</sup>

Despite the above information of which he was aware, Mr. Ewald questioned whether Mr. Allard was seriously concerned about the leakage and structural issues. He had issued a Notice of Violation instead of an order. Although the City's policy stated that a notice was the first step of the process, Mr. Ewald maintained the view that if the problem was as serious as claimed by Mr. Allard, he would have issued an order. He testified, however, that he did not speak to Mr. Allard about the notice or his practice.<sup>399</sup>

Mr. Ewald maintained that he did not know when the leaking problem started at the Mall and that he was unaware it had been ongoing for a period before 2006, despite his acknowledgement that

- potential structural damage resulting from leaks, as noted by Mr. Allard, does not happen overnight;
- Mr. Turner's letter to Mr. Derreck of November 13, 2006, which was included in the package sent by Chief Officer, stated that the leaks had been ongoing for 25 years; he claimed he read the letter, but that the information did not "stay" with him;

- he believed a rooftop parking was a “dumb idea” because it was prone to leaks; and
- Mr. Allard had issued the 2006 Notice of Violation, and the council had treated the matter seriously.<sup>400</sup>

I find it astonishing that Mr. Ewald treated this matter so lightly and did not review the file he had in his possession with more detail and attention. The role of the chief building official has at its core the safety and protection of the public. It was apparent that the discovery of this outstanding Notice of Violation constituted an alert that public safety might be in danger.

### **Senior City staff and the mayor meet to discuss the outstanding 2006 Notice of Violation, and an inspection is ordered**

Mr. Bauthus took the matter seriously. After reading the documents, he contacted Chief Officer and made arrangements to meet the next day with Mr. Ewald, Chief Officer, Mayor Hamilton, and Ms. MacLean.<sup>401</sup> Early in the morning of September 24, 2009, they met (with Ms. MacLean on the telephone) to discuss the issues raised by Chief Officer’s email.<sup>402</sup> It was unusual for all these senior officials to meet together.<sup>403</sup> They evidently considered the matter serious and important.

Mayor Hamilton initially testified that he really did not know why Mr. Bauthus had asked him to be present at the meeting. When pressed, he admitted that he was probably asked to be there because he was the mayor and it was an unusual situation, and because Mr. Bauthus thought it was important that he be made aware of what was going on. Mayor Hamilton testified that he agreed it was appropriate for him to be present at that meeting because he needed to know about a serious situation such as this one, as did the council.<sup>404</sup>

In his notes of the meeting, Mr. Bauthus recorded the following:

- Need to issue property standards order.
- Need to have assessment, then remedy.
- Since 2006
- Need to give order under Bldg Code to assess and remedy.
- Fire to issue a notice when order is issued.
- Need to meet with Nazarian early – Friday, Sept 25.
- Do property search to search all interested parties.
- Register on title?
- Need to do whole building
- \*Memo to Rick H [Hamilton].<sup>405</sup>

Ms. MacLean advised the group that this matter was serious and that the City had to move quickly.<sup>406</sup>

There was a discussion about the necessity to issue a property standards order against the Mall. It was agreed, however, that before an order could be issued, the Mall needed to be assessed by Mr. Ewald to determine the extent of the problems.<sup>407</sup> It was also agreed, as Mr. Bauthus’s notes indicate, that the City would require an engineer to inspect the “whole building” and not only the leakage areas.<sup>408</sup> Chief Officer agreed to wait for Mr. Ewald to issue his order before issuing a notice related to the *Fire Code* violations.<sup>409</sup>

Mr. Ewald testified that there was also a discussion about whether the situation presented an immediate life threat that would allow the City to issue an order under the *Building Code* and the *Fire Code* rather than the Property Standards By-law.<sup>410</sup> Mr. Ewald explained that the *Building Code Act* allows the chief building official to issue an order to remedy or close a building that is structurally unsound where there is a belief that there may be a threat to life.<sup>411</sup>

Mr. Bauthus was not sure whether he told Mr. Ewald at the meeting that he was aware the Library had ongoing leakage problems since moving into the Mall, but he believed he would have mentioned something along those lines. He testified that he did not advise Mr. Ewald that the leaks were such a problem that the Library was refusing to sign the lease with the Mall. He expected that Mr. Ewald would have learned from the meeting and other communications provided to him by Chief Officer the day before that the leakage problem was long-standing and predated 2006. Chief Officer and Mayor Hamilton were aware of the long history of leakage as well. The extent of the leaks was also discussed at the meeting.<sup>412</sup>

Mayor Hamilton testified that, when he learned about the outstanding Notice of Violation, he was surprised that nothing had been done in the previous three years – and that this lack of response concerned him. He said he was aware, either at the meeting or shortly thereafter, that the notice Mr. Allard had issued in October 2006 required that repairs be carried out to the existing Mall parking surface to prevent leakage of water into the building. He was also aware that a request had been made at the time for a review by a professional engineer of the building's structural frame in leakage areas and a report certifying either the acceptability of the existing condition or the remediation steps necessary to be taken to ensure structural soundness. Mayor Hamilton was informed that neither had been done – the leaks had not been fixed and no report had been obtained.<sup>413</sup>

When asked whether he recalled if some concerns were expressed at the meeting about the potential effects on the building of the water and the leaks, Mayor Hamilton testified that he was not sure that was the overriding issue at the time. He testified that the discussions focused on examining the 2006 Notice of Violation and determining if the violations still existed and what remedies were available.<sup>414</sup> Missing from the discussion was the reality that the Mall had been leaking for three decades, that the Library had been complaining about leaks since it moved in, and that three years of further deterioration had occurred since 2006.

### **The City consults Bruce Caughill about a possible inspection at the Mall**

On the same day as the meeting,\* Mr. Ewald contacted Bruce Caughill to ask him whether he could perform a review of the Mall. Mr. Ewald advised Mr. Caughill that he had concerns about the Mall, but did not provide any specific details.<sup>415</sup> Mr. Caughill testified that he understood the inquiry from Mr. Ewald to be a request for assistance on behalf of the City. He was not sure what kind of assistance the City was looking for, but he believed it was in the context of the 2006 Notice of Violation.<sup>416</sup>

Mr. Ewald testified that the purpose of his conversation with Bruce Caughill was twofold. He wanted to know (1) whether a 30-day timeframe to request an engineering report was appropriate; and (2) what would be involved if the City decided to obtain its own engineer to review the building.<sup>417</sup> Mr. Ewald testified that Mr. Caughill advised him that 30 days was acceptable.<sup>418</sup>

Regarding the second issue raised by Mr. Ewald, at 9:09 a.m., following the call, Mr. Caughill sent an email to Mr. Ewald advising him that a review of the Mall would be beyond his capabilities:

As discussed, the review of this building would be beyond my staff and time capabilities.

I called Bob Wood of MR Wright Associates to see how they might respond. I have worked with MRW and Bob Wood on many files over the past 30 years and believe they are the right fit.

Between their resources and experience my knowledge of the building the 30 day time frame is achievable.

.....

\* It is not clear whether the conversation between Mr. Ewald and Mr. Caughill occurred before or after the meeting with the other City officials discussed above: Ewald testimony, May 27, 2013, p. 11579.



One complication may be that MRW is currently doing some non-structural work for Eastwood – a small tenant space prep in the former Retirement Living space.

Bob is currently reviewing with his staff to be sure that that would be the only possible conflict.

I'll get back to you shortly.<sup>419</sup>

Mr. Caughill confirmed that he spoke with Mr. Wood on the same day he sent the email to Mr. Ewald. During their conversation, Mr. Wood did not advise Mr. Caughill of anything he had observed at the Mall while doing work there or any specific knowledge he had about the Mall.<sup>420</sup>

During his conversation with Mr. Ewald, Mr. Caughill did not tell him that he had inspected the Scotiabank location in the Mall in September 2008 and had recommended that the bank ask the landlord to obtain a report on the structural integrity of the Mall. Mr. Caughill did not believe this information was useful for Mr. Ewald in the context of their 15-minute telephone call.<sup>421</sup> I find this omission surprising, to say the least, particularly considering Mr. Caughill's knowledge of the state of the leaks at the Mall and the fact that he had thought it necessary, at least in September 2008, to inform the City about his retainer by Scotiabank.

At 9:34 the same morning, 25 minutes after his first email, Bruce Caughill sent another email to Mr. Ewald:

Bob Wood is interested but has concerns on the ethics (my word) of the situation. Given that Eastwood is currently his client how ethical is it that he would undertake a review ...

MRW would like to do the review but only with the prior knowledge and consent of Eastwood.

If not MRW then I believe you should contact Halsall.<sup>422</sup>

Mr. Ewald testified that after receiving this second email from Mr. Caughill, he did not contact Halsall because he was just looking into options at that point. The City ultimately determined that it would have the owner hire his own engineer through the Property Standards By-law process. Mr. Ewald added that this decision was discussed at the meeting with the other City officials that morning.<sup>423</sup> Mr. Ewald testified that the City decided to let the owner hire the engineer because the Professional Engineers Association guides all engineers and because the City would not have to go through the cost-recovery procedures. Mr. Ewald agreed that if the City had hired the engineer, it would have been able to determine the scope of work via its order.<sup>424</sup>

Although this plan would have been logical, it is not what happened. Mr. Ewald never ascertained the actual scope of work given to Robert Wood by Eastwood when it retained him.

## **An inspection is conducted of the Mall: Evidence of water infiltration and rust is abundant**

As a result of the meeting, on September 24, 2009, at 10:30 a.m., an inspection of the Mall was conducted by Mr. Ewald along with Chief Officer, Firefighter Connors, and Dimitri Yakimov, as representative of the Mall.<sup>425</sup>

### **Chief Officer discovers Fire Code violations**

In the course of this inspection, Chief Officer discovered certain deficiencies, which he noted in an inspection report. It cited four locations in the Mall where fireproofing material was observed to be missing from beams above the ceiling on the second floor. The areas were between the lottery kiosk and the escalator, in the back corner of the Dollarama store, in the Bargain Shop, and in the service corridor (exit corridor) behind the Dollarama store.<sup>426</sup> The report noted that although only four areas were identified in this inspection, all

water-damaged areas would require inspection and remediation as needed. The inspection revealed some other *Fire Code* violations. The report concluded:

The owner is requested to provide appropriate documentation satisfactory to the Chief Fire Official by October 24, 2009, showing that a building permit has been applied for which will result in work being undertaken to correct the violations. Further, be advised that failure to correct these violations within 3[0] days of the date as determined by the Chief Building Official may result in prosecution.<sup>427</sup>

Chief Officer explained that his expectation was that giving Bob Nazarian a deadline would move the work forward and provide him with a schedule for the proposed repairs.<sup>428</sup>

### **Mr. Ewald discovers property standards violations**

Mr. Ewald described the inspection as random and not based on a prior knowledge of where the worst leakage areas were located.<sup>429</sup> In fact, he did not inspect Scotiabank or the Library.<sup>430</sup> This was the first City inspection of the Mall in 2009.<sup>431</sup>

During his inspection, Mr. Ewald testified that he used a ladder in some locations, including the lottery kiosk area.<sup>432</sup> He noted that ceiling tiles had been removed in many parts of the Mall owing to leaks.<sup>433</sup> In the locations where he used the ladder, Mr. Ewald testified that he touched the beams with his hands, but he obviously did not conduct an analysis of the structural stability or strength of the steel.<sup>434</sup>

In his inspection report, Mr. Ewald noted the following 13 observations:

- 1) Evidence of water leakage on upper level of mall above the lottery ticket booth adjacent to the food court. Missing fire proofing on structural steel members; rust on structural steel (2 pictures taken)
- 2) Evidence of water leakage from above the Dollarama. Missing fireproofing on structural steel beams and rust is also evident (2 pictures taken)
- 3) Evidence of water leakage above the Bargain Shop with missing fireproofing and minor rust on structural steel beams noted in several location of the store (2 pictures). Missing fire proofing noted in the rear storage room on the structural steel (1 picture)
- 4) Evidence of water leakage in service hall behind the Dollarama. Missing fire proofing and rust evident on structural steel (2 pictures)
- 5) Missing door closure on fire door in service corridor closest to washroom corridor (1 picture taken)
- 6) Evidence of water leakage, missing fire proofing and rust at structural steel in service corridor behind Library (1 picture)
- 7) Exit doors to parking deck above Scotiabank and Zellers area do not operate properly (2 pictures on inside and 2 pictures on outside). An addition metal plate has been added to the right door (from inside) that does not permit the left door to open without first opening the right door
- 8) Lighting levels in the west service corridor are well below req'd levels
- 9) Missing fireproofing on structural steel above main corridor in front of new mall office (2 pictures)
- 10) Evidence of multiple leaks (more than 20) on ceiling tiles in the Zellers store (3 pictures)
- 11) Evidence of rusted steel stairway outside in front of Foodland (1 picture)
- 12) Rusted structural steel all along covered walkways adjacent main mall entrance (1 picture)
- ...
- 13) It is also noted that the up escalator was not functioning at the time of the inspection<sup>435</sup>

The photographs taken by Mr. Connors during Mr. Ewald's inspection<sup>436</sup> are in Exhibits 4374 through 4395 (see figures 1.10.2–1.10.7).

The first observation Mr. Ewald made of water leakage on the upper level of Mall above the lottery ticket booth is depicted in figure 1.10.2. He confirmed that this photograph showed rust on the structural steel I-beam that eventually collapsed – as I have already described in chapter 3, *Causes of the Collapse*.<sup>437</sup> Mr. Ewald testified that, during his inspection, he was not specifically looking for the connections but was observing the beam in order to assess what shape it was in and whether further inspection was necessary. He concluded from his observations that a further inspection was necessary for the entire building, including the connections, because the connection between the horizontal and the vertical members of any structure is crucial to structural stability.<sup>438</sup>

The second observation Mr. Ewald made is depicted in figure 1.10.3.<sup>439</sup> He confirmed that this photograph showed the missing fireproofing and rust (see red-brownish colour on I-beam) on the structural steel above the Dollarama store.<sup>440</sup>

The third observation Mr. Ewald made is depicted in figure 1.10.4,<sup>441</sup> where, once again, infiltrating water had caused rust and missing fireproofing on the I-beam, this time above the Bargain Store.<sup>442</sup>



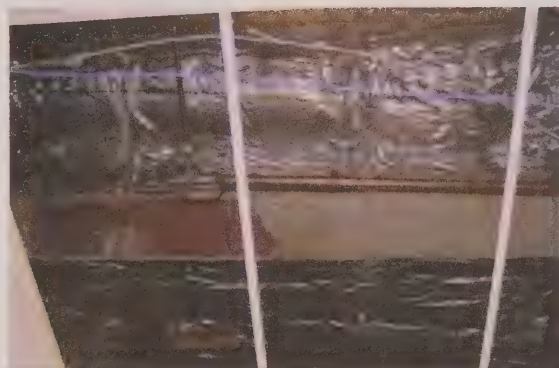
**Figure 1.10.2** Missing fireproofing and rust on a structural steel beam in the upper level of the Mall above the lottery kiosk

Source Exhibit 4374



**Figure 1.10.3** Missing fireproofing and rust on a structural steel beam above the Dollarama store

Source Exhibit 4377



**Figure 1.10.4** Rust and missing fireproofing caused by water leakage on the I-beam above the Bargain Store

Source Exhibit 4378





**Figure 1.10.5 Rust and missing fireproofing on the bottom of the structural steel and smaller pipe in the service hall behind the Dollarama store**

Source Exhibit 4381



**Figure 1.10.6 Evidence of water leakage, missing fire proofing, and rust on the structural steel in the service corridor behind the Library**

Source Exhibit 4384

The fourth observation Mr. Ewald made is depicted in figure 1.10.5,<sup>443</sup> where water leakage has caused fireproofing to fall and rust to form on the bottom of the structural steel and smaller steel pipe in the service hall behind the Dollarama store.<sup>444</sup>

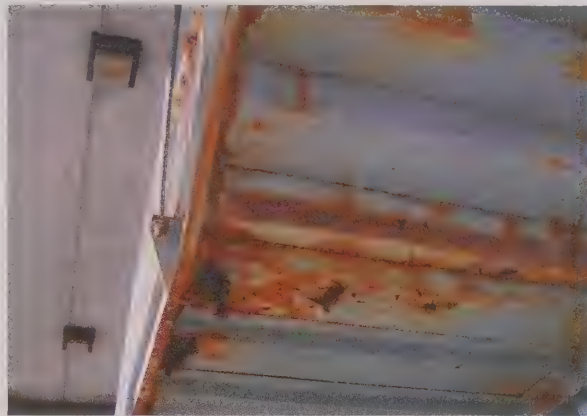
Surprisingly, Mr. Ewald checked all four of these areas in the Mall in approximately 15 minutes.<sup>445</sup>

The sixth observation during this inspection – evidence of water leakage, missing fireproofing, and rust on the structural steel in the service corridor behind the Library – is depicted in figure 1.10.6. Mr. Ewald agreed that this photograph showed rust on the I-beam, which is resting on the poured concrete wall. He also agreed that the darker red colour on the I-beam farther from the wall was an area of heavier rust. He could not confirm from the photo whether the area where the I-beam enters the concrete showed that rust had eaten away at the edge of the flange of the I-beam, but believed it may have been rust. He testified that, because of the possibility of rust, he ordered an inspection to be conducted by an engineer. Mr. Ewald agreed that the pipes that were suspended below the I-beam showed significant areas of moisture ingress and discolouration on the concrete wall.<sup>446</sup>

With regard to the 10th observation, which took place at Zellers, Mr. Ewald confirmed that this store had experienced more leaks than any other premises in the Mall.<sup>447</sup>

For his inspection of areas five through 10, Mr. Ewald covered them all in approximately 40 minutes.<sup>448</sup>

The 11th observation – evidence of the rusted steel stairway outside the Mall and in front of Foodland, leading from the ground floor to the second floor – is depicted in figure 1.10.7. Mr. Ewald agreed that the photograph showed rust that had eaten through the steel and made holes in it.<sup>449</sup> However, he did not appear to be concerned about this deterioration. He explained that in an area with lighter weight, such as this one, the steel was intended to support the concrete poured over it only until it cured. For that reason it needed little structural capacity.<sup>450</sup>



**Figure 1.10.7 The rusted steel stairway outside the Mall and in front of the Foodland store**

Source Exhibit 4394

The 13th and final item on the report indicated that “[i]t is also noted that the up escalator was not functioning at the time of the inspection.”<sup>451</sup>

After his inspection, Mr. Ewald came to the conclusion that there had been potentially serious issues regarding leaks over some time at the Mall and that there might be structural damage. This conclusion prompted him to request further investigation by someone more qualified than he was in these areas.<sup>452</sup>

Mr. Ewald’s inspection revealed one thing for certain: the leaks had not improved since the Notice of Violation had been issued in 2006. Rather, it appeared that the situation had become much worse.

### **City Council is informed of the outstanding 2006 Notice of Violation, and the former chief administrative officer is unfairly blamed**

Following Mr. Ewald’s inspection, in the afternoon of September 24, 2009, Mr. Bauthus sent an email to council members, copying Chief Officer, Mr. Ewald, and Ms. MacLean:

This is to advise that we are presently reviewing the past issues respecting the impact of water infiltration *on the support structural members at the mall*. In 2006 notices were issued to connect the fire proofing of the support members however nothing was done to date and current investigations brought this to our attention. Some of the reason for the lack of follow up was as a result that the former CAO had arranged that communications respecting the issue would be done with the then manager of the mall; both of these parties are no longer with the respective employers.

Current inspections suggests [*sic*] that the issues are being addressed but without benefit of a building permit and engineering assessment.

A meeting has been requested with Eastwood Mall as soon as possible to address the concerns and we will be following up to ensure that code is met and there are no life safety issues. This will involve the issuance of an order. Staff are ensuring that we are doing all that is required under the legislation.<sup>453</sup>  
[Emphasis added.]

Mr. Bauthus’s reference to the correspondence being between parties no longer with their employers referred to Mr. Turner and Mr. Derreck, who had left the employ of Eastwood and the City, respectively, in 2007. He agreed, however, that there was no letter indicating that Mr. Derreck was taking over from Mr. Allard responsibility for the issue.<sup>454</sup> Mr. Bauthus was not aware of the results of Mr. Ewald’s inspection when he sent the email. He did know,

however, that there were serious issues with leaks and there was a possibility that the structural capacity of the Mall had been affected.<sup>455</sup> Mr. Bauthus agreed that a building whose structural capacity has been affected could possibly collapse and that he relayed this concern to council by stating that staff would ensure that the *Building Code* was adhered to and that safety issues would be resolved.<sup>456</sup>

By this time, members of council who had been present in 2006, including Mayor Hamilton, knew, or should have known, about the seriousness of the matter. Mayor Hamilton testified that when he received this email, he knew there was a potential for water damage on the structural support members at the Mall.<sup>457</sup> In addition, council knew that the owner of the Mall had been telling the City for years that he was fixing the leaks – and that he had not in fact done so. Although Mayor Hamilton claimed he was concerned there might be rust that would damage and weaken the structural steel members, he testified that he did not consider it necessary, after receiving Mr. Bauthus's email, to ask him whether the inspection had shown structural damage or if the chief building official was issuing an order.<sup>458</sup>

Mayor Hamilton testified that, as of this date, the lease with the Library had not yet been signed. He testified that when he found out about the potential for structural problems and the fact that, despite a Notice of Violation, nothing had been done in three years, it did not cause him to rethink whether the lease with the Library should be signed. When asked whether he was worried that maybe the City was forcing the Library to stay in a building that had not been fixed and might be structurally unsound, Mayor Hamilton testified:

A. Well, this was about the entire mall, so I was more concerned about the entire mall, yes. There was some concerns then.

Q. You were concerned –

A. But I didn't equate it to the lease. The lease was the last thing on my mind when I saw this.

Q. You were concerned about the entire Mall and the potential for structural instability, is that your evidence?

A. Well, what it states here, water infiltration on the support structure members of the mall, that is what I was aware of, yeah, so that concerned me, because it was being reported to us by our ... Chief Administrative Officer.

Q. So what did you do about that concern?

A. I believe, again, what the minutes do indicate, that our staff ... went in and investigated and issued the appropriate orders, from what I understand.<sup>459</sup>

**I do not agree with Mr. Bauthus's assertion that Mr. Derreck can be blamed for the failure to enforce the 2006 Notice of Violation. In my view, that was caused by Mr. Allard's inaction and his failure on his retirement to advise his successor, Chris Clouthier, of the outstanding notice.**

I am skeptical of the mayor's evidence. Those are not the words of a man concerned by what had been uncovered. How could the issue of the Library lease not come to his mind in these circumstances given that the very reason the Library board was refusing to sign the lease was the leaks, which had been ongoing for decades?

I do not agree with Mr. Bauthus's assertion that Mr. Derreck can be blamed for the failure to enforce the 2006 Notice of Violation. In my view, that was caused by Mr. Allard's inaction and his failure on his retirement to advise his successor, Chris Clouthier, of the outstanding notice. Quite the opposite. Mr. Derreck was actually the instigator of the only real action ever taken by the City. The 2009 Order to Remedy was issued only because the City failed to ensure that the 2006 notice was enforced.



## The City issues an order against Eastwood, requiring it to get the Mall inspected and deficiencies corrected

On September 25, 2009, Mr. Ewald issued an Order to Remedy to Eastwood, requiring that a series of deficiencies, including those relating to the structural soundness and watertightness of the roof of the Mall, be remedied by October 30, 2009. The order stated:

**DEFICIENCY:** An inspection has revealed damaged fire proofing materials and/or excessive rust due to long term water infiltration on structural steel beams in the following areas:

- a. Above the lottery ticket booth adjacent the food court.
- b. Above the Dollarama store.
- c. Above the Bargain shop.
- d. Above the service hall behind the Dollarama.
- e. Above the service corridor behind the Library.
- f. Above the main corridor in front of the new mall office.

Further to this it was noted that there was evidence of numerous leaks (more than 20) above the Zellers store and evidence of rusted structural components outside in front of the Foodland and the main entrance to the mall.

**REMEDY:** The owner shall have the entire mall area inspected by Structural Engineer licensed in the Province of Ontario and correct all deficiencies noted above and any further deficiencies which may be discovered by the engineer in the manner prescribed by the afore mentioned engineer. Obtain a building permit for the required work to be undertaken pursuant to Section 8.(1) of the Ontario Building Code Act.

...

**DEFICIENCY:** An inspection has revealed that a door closure is missing on the fire door in the service hallway adjacent to the upper level washroom corridor. Also the fire doors on the upper parking deck from the service corridor exit behind the Scotia Bank are not functioning as intended.

**REMEDY:** The owner shall have these items repaired by a competent locksmith / service technician.

...

**DEFICIENCY:** An inspection has revealed that the escalator travelling from the hotel lobby to the upper level adjacent to the food court is not functioning.

**REMEDY:** The owner shall have the escalator repaired by a competent service technician.

[All bolding in the original.]<sup>460</sup>

I note the following from the above order:

- Mr. Ewald chose to issue an order, unlike Mr. Allard who, in 2006, had issued a Notice of Violation. An order has the force of law, in contrast to a notice, which attempts to produce voluntary compliance. The order was the first step, failing compliance by the owner, before the City would lay charges and/or undertake the repairs itself and require the owner to pay the cost;<sup>461</sup>
- Mr. Ewald referred in his order to “damaged fire proofing materials and/or excessive rust due to *long term* water infiltration on structural steel beams” [emphasis added]. Mr. Ewald testified that, by “long-term,” he meant that the Mall had been leaking since at least 2006. As I noted above, although Mr. Ewald admitted that the City had received correspondence from the owner stating that the Mall had been leaking for 25 years, he does not believe “that actually clicked in [his] brain;”<sup>462</sup>

- Mr. Ewald referred in his order to the six areas he had inspected the day before;<sup>463</sup>
- The remedy he imposed, however, required that the “entire Mall area” be inspected. Mr. Ewald testified that he used the words “the entire Mall area” because he did not want the engineer to assess only the areas he had inspected. His own inspection had been cursory, and he wanted the engineer to review the entire Mall.<sup>464</sup> Mr. Ewald agreed that the deficiencies to be corrected included long-term water infiltration, and he expected the connections between the horizontal and vertical support beams and columns to be checked by the engineers;<sup>465</sup>
- In his order, Mr. Ewald required that the owner obtain a building permit for the required work. He testified that the requirement for a building permit would have allowed the Building Department to be satisfied that the work was being done appropriately, was reviewed, and, if necessary, was supervised by an architect or an engineer.<sup>466</sup>

Mr. Ewald testified that, before issuing his 2009 order, he *skimmed* the 1999 Halsall report found in the Building Department’s file but did not read it fully and carefully until after the collapse.<sup>467</sup> He admitted that, had he read the entire report, he would have been aware that leakage had been ongoing at the Mall since the day it opened. As a result, he would have taken a more proactive role regarding the leakage problem, such as being concerned about the structural steel and asking for items to be uncovered during the inspection, and would have considered having the City step in and make the necessary repairs to the roof.<sup>468</sup>

Considering the tragic result that led to this Commission, the lack of interest and diligence on the part of the chief building official has proven most regrettable, to say the least.

Mr. Ewald testified that, as had been discussed at the September 24 meeting with the other City officials, he conducted a title search to see if there were any mortgagees on title or other encumbrances because he wanted to give notice of the order. Although such notice would have allowed recipients to know there was a serious issue that required the City to issue an order, the fundamental intention was for the City to get Bob Nazarian’s attention. The City was hoping that these individuals would communicate with Mr. Nazarian to put pressure on him to fix the roof.<sup>469</sup>

In less than 48 hours after discovering the outstanding Notice of Violation, the City had inspected and issued an order against Eastwood to fix the leaks and assess its structural capacity – remedies similar to those included in the 2006 Notice of Violation. Unfortunately, the chief building official would rescind the order in a relatively short time after its issuance and without its being complied with.

### **Bob Nazarian is advised of the 2009 Order to Comply: He understands he has to stop the leaks**

A meeting to discuss the newly issued order was scheduled with Bob Nazarian less than two days after Mr. Bauthus had been alerted to the outstanding 2006 Notice of Violation. Mr. Bauthus testified that the City moved expeditiously because it was felt that the matter required immediate action.<sup>470</sup>

In the afternoon of September 25, 2009, Mr. Bauthus, Mr. Ewald, and Chief Officer met with Bob Nazarian and Mr. Fabris to present them with the order.<sup>471</sup> In the notes he took of the meeting, Chief Officer recorded:

We were here to discuss the issues with the mall and the fire proofing material.

Issued order to Mr. Nazarian.

\*Get Darren [Connors] to get list of pictures of the mall so I can get it [to] Rene

All was explained and the order in which he needs to get this done. It was explained to Mr. Fabris why he needs a building permit. This will ensure an Engineer verifies structure and controls restoration, proper fire proofing and so on.<sup>472</sup>

The meeting covered the following points:

- The City officials explained the order to Bob Nazarian, emphasizing the fact that he needed to get an engineer to do the work; Mr. Nazarian advised the others he would hire an engineer to do the work.<sup>473</sup>
- No one thought to ask Mr. Nazarian what he had done to comply with the 2006 Notice of Violation and why he had not complied with it.<sup>474</sup>
- Mr. Fabris said that he did not believe that Eastwood needed a permit to do repairs on the roof, so it was explained to him that a permit was necessary.<sup>475</sup>
- Mr. Nazarian said that if he sprayed fireproofing without the roof being sealed 100 per cent, the fireproofing would just wash away again.<sup>476</sup>

Chief Officer had reservations about Bob Nazarian's level of co-operation going forward.<sup>477</sup> That was entirely reasonable, considering the absence of co-operation shown by Mr. Nazarian to date with respect to the 2006 Notice of Violation.

### **Was there a relationship between the Library lease negotiations and the order of September 24, 2009?**

No one informed the Library board that an order had been issued requiring the owner to fix the leaks. No explanation was provided for this omission.<sup>478</sup>

Mayor Hamilton testified that the Library lease issues and the potential for its eviction were completely unrelated to the Order to Remedy being issued.<sup>479</sup> Mr. Bauthus testified that he had no discussions with Mayor Hamilton in September and October 2009 about the potential structural issues that caused an Order to Remedy to be issued, even though the mayor was aware of these concerns and council had been informed of the order.<sup>480</sup>

It is apparent, as Mr. Bauthus testified, that Mayor Hamilton had taken a personal and significant interest in getting the lease signed and having the Library stay in the Mall.<sup>481</sup> The order followed an inspection that occurred immediately after the unprecedented September 24 meeting among the mayor, Mr. Bauthus, Mr. Ewald, and Chief Officer to discuss the issues arising from the lack of response to the October 2006 Notice of Violation. Mayor Hamilton took part in that meeting where the discussion included the potential to immediately issue an order against the Mall if Mr. Ewald's inspection showed imminent structural concerns.

The Order to Remedy was issued on September 25, 2009, less than a week before the lease was to come to an end and with the Library facing potential eviction. Eight days later, on October 2, 2009, Mr. Fabris advised Mr. Bauthus that the Library would not be evicted. Very soon afterward, the City appears to have lost interest in enforcing the order.

I find it passing strange that these two series of events, both involving the Mall and the issues it faced about the leaks, occurred without, at the least, Mayor Hamilton and Mr. Bauthus recognizing and discussing the potential for one to affect the other. It is difficult to conceive that the two events were totally serendipitous and unrelated. The Order to Remedy – preceding by one week Eastwood's abandonment of its position that the Library would have to vacate the Mall – appears to have been happenstance and coincidence.



### Mr. Ewald did nothing to enforce the Order to Remedy

Despite his suspicions that Bob Nazarian would not be eager to comply with the order, given his non-compliance with the 2006 Notice of Violation, Mr. Ewald did nothing to ensure that his order was complied with. He testified:

- Q. And so you knew that Mr. Nazarian had not complied with the order of three years before.  
I take it you knew from that, that he may not be terribly eager to comply with this?
- A. I had those suspicions, yes.
- Q. And so what did you do in an attempt to allay those fears?
- A. I'm not sure I understand the question. I did an order.
- Q. Okay. Other than the order, did you do anything else to follow up?
- A. I may have but I don't have a distinct recollection at this point of what else I may have done.  
The order is generally sufficient.<sup>482</sup>

### Mr. Nazarian did not take the order seriously

Bob Nazarian testified that

- he agreed there was damaged fireproofing and/or excessive rust on the structural steel beams but stated, "those damages and leakage of waterproofing was nothing new. They had been there for a very, very long time";
- he agreed with the description in the order of the numerous leaks in different areas of Zellers – in fact, when asked whether the description was true, he said "[o]bviously";
- he understood that the order required him to have the entire Mall inspected by a structural engineer, not just the areas that were identified, in order to determine whether there were deficiencies, including structural deficiencies;
- he knew the order required him to correct the deficiencies, including fixing the leaks, the fireproofing, and everything else listed in the order or discovered by the engineer; and
- he knew the order required him to obtain a building permit to perform the work.<sup>483</sup>

Surprisingly, Levon Nazarian, who was attempting to sell the Mall, testified that he was not aware of the 2009 Order to Remedy at the time.<sup>484</sup>

When asked what he did to fix the leaks after receiving his order, Bob Nazarian stated:

- Sir, we never stopped working to fix the leaks. This is nothing now [*sic*]. You know that. I know that. This has been going on for very, very long time. I should say from the time that they have built, now that it is revealed, so I was doing everything in my power, almost every day, to repair the leak and keep the mall in a good condition. As you saw, we have spent lots of money, lots of energy and try to do our best. Now it's very easy to say "Do it" – but how? Yet, when it comes to help, they just simply issue order.
- Okay. It's much easier to write down order. If you don't do it, I'll kill you. Okay, fine, kill me, I can't do it.  
What can I say?<sup>485</sup>

Mr. Nazarian agreed that, in light of the order, it was clear that what he had been doing thus far was not working and he would not be complying with the order if he kept doing what he had been doing since 2005. When it was put to him that he could have fixed the leaks by installing a thin membrane as recommended by Mr. Holford, Mr. Nazarian responded:

- A. It would not work, sir.
- Q. Well, Mr. Holford [Andrew Holford, an engineer from Kleinfeldt Consultants] said it would work.

- A. I don't care what Mr. Holford said. I know more than Mr. Holford about this roof. It is not that – I'm not an engineer but I know enough, with the experience and exercise that this roof was not going to be fixed unless we remove all the parking and we put a thick layer of rubber membrane and cover it with something very thin and forget about the roof, not to snow clean, not to let anybody drive on or so on; that was the solution. I knew that. And thin layer would not work under any circumstances.

Imagine if you put a piece of plastic on top of a car, and then you scrape with something very heavy; it's not going to stay.<sup>486</sup>

Mr. Nazarian also agreed that, when he got the 2009 order, he did not hire anybody to give him any other advice:

- Q. So Mr. Holford didn't know what he was talking about?
- A. No, he knew ... on the paper it looks good, but when you have three, four, ton pressure from the blade coming on a thin layer of plastic it would not last, sir. It would not.
- Q. So you rejected his advice and you did not hire an engineer to give you any other advice about how to fix the roof; correct?
- A. Sir, may I –
- Q. Is that not true?
- A. There were dozens of engineers.
- Q. Who did you hire to give you advice about how to fix the roof after you rejected Mr. Holford's advice.
- A. We had Mr. John Clinckett, Mr. Holford. We had other engineer after Mr. Holford.
- Q. Yes, you had ... Mr. Sarvinis, right?
- A. Mr. Sarvinis, yes.
- Q. We'll get to him. And that was in 2010; right?
- A. Yes.
- Q. But in 2009 you got this order, you did not hire anybody to give you any other advice; right?
- A. No.
- Q. And you had not hired anybody since you fired Mr. Holford?
- A. Yes.<sup>487</sup>

In sum, in 2009 Bob Nazarian did not attempt to fix the leaks – and he no longer wanted to fix them. He testified that the only way he could stop the leaks was to put on a normal roof and get the cars off the roof.<sup>488</sup> As I have explained, he testified that he came to this conclusion in 2008. However, as will be seen, he did not take any specific steps to initiate this project until 2011 – and he never completed it.

## September 28: Robert Wood is retained by Eastwood to inspect the Mall

### Mr. Fabris restricts the scope of work of Mr. Wood

After receiving the Order to Remedy, Bob Nazarian instructed Mr. Fabris to hire an engineer. He claimed that he advised Mr. Fabris to give instructions to the engineer to comply with the City's order, inspect the entire building, and prepare a structural report. Mr. Wood appears to have been selected because he had been working with the Mall for a few years and Mr. Nazarian trusted his judgment.<sup>489</sup>

On September 28, 2009, Mr. Fabris sent a letter to M.R. Wright enclosing a copy of the Order to Remedy. In his letter, Mr. Fabris stated: "The Order to Remedy Violation includes the mall [*sic*] to have the mall inspected by a structural engineer, *specifically the items located under deficiency*"<sup>490</sup> [emphasis added]. Mr. Wood confirmed that he believed he received the letter.<sup>491</sup>

Mr. Fabris would not agree that his statement restricted the inspection to be performed. In his view

[Mr. Wood] had to pay more attention to that, specifically pay attention to those deficiencies, but the whole order was given to Mr. Wood and I certainly didn't restrict him in any way. He had to pay special attention to those areas.<sup>492</sup>

Mr. Fabris understood that the inspection would be of the entire Mall but would not include any destructive testing, or that any such testing would be minimal.<sup>493</sup> Mr. Wood, in contrast, testified that, from Mr. Fabris's letter, he understood that he was being asked to inspect the Mall according to the specific items listed in the Order to Remedy.<sup>494</sup> Despite acknowledging that the structural soundness of the building and its watertightness were part of the two by-law provisions identified as deficiencies in the Order to Remedy,<sup>495</sup> Mr. Wood testified that his mandate did not include determining the adequacy of the watertightness of the Mall during his review.<sup>496</sup>

Although it does appear that Mr. Fabris's letter somewhat restricted the scope of Mr. Wood's work, I find it difficult to accept Mr. Wood's evidence about his understanding of his mandate. Knowing that he was retained because of the Order to Remedy, Mr. Wood should have determined what regulatory provision was alleged to have been violated by his client, whether that was in fact accurate, and how these deficiencies could be fixed. In any event, the letter and spirit of the order were clear enough. Mr. Wood had a great depth of experience. The plain wording of the order should have been sufficient.

### **Bob Nazarian is made to believe that the matter is not "that serious"**

Later on September 28, 2009, Mr. Fabris sent a reporting letter to Bob Nazarian regarding the meeting he attended on September 25 with City officials and the 2009 Order to Remedy. Mr. Fabris stated in the letter:

While initially both the City and the Building Department were concerned that there might be some structural damage, they did voice their opinion that it was not as serious as they had initially thought, and thus no stop work violation had been issued.<sup>497</sup>

Mr. Fabris explained that during the meeting with the City officials, they told him that if they had thought the problems at the Mall were really serious, they would have closed down the Mall. According to Mr. Fabris: "They didn't think it was that serious."<sup>498</sup>

Given Mr. Fabris's knowledge of the leaks at the Library, and particularly his role as counsel to Eastwood, I find it rather curious that he would suggest to his client that the matter was not "that serious," implying that the matter could be taken lightly.

### **Mr. Wood accepts the mandate but is not provided with all the background about the Mall**

On September 29, 2009, Mr. Wood responded to Mr. Fabris's letter of September 28 and advised that he would be

pleased to offer our Structural Engineering Services to conduct an inspection at the Mall on Monday, October 5th to familiarize ourselves with the project and to specifically assess the validity of the City's concerns regarding the parking level roof structure over the shopping complex.

We plan to be on site at 9:00 a.m. and look forward to meeting with mall representatives. We are forwarding the attached to the property Owner and look forward to meeting the Local Manager Monday morning and hope to arrange access to inspect the areas of concerns.<sup>499</sup>

Bob Nazarian claimed that after he hired Mr. Wood, he met with him on the top of the roof and walked around with him. He showed him some critical tenant spaces, including Dollarama, the Library, Zellers, Scotiabank, and Northern Reflections, and then left it between him and Mr. Fabris to ensure that the City would be happy with



the inspection. Mr. Nazarian thought Mr. Wood was there for the inspection for one to two hours. He stated that he told Mr. Wood he needed the entire Mall inspected. They did not go up and pull ceiling tiles down or move them aside. Mr. Nazarian stated that Mr. Wood came on another day to do the inspection but could not recall when.<sup>500</sup>

I do not accept Bob Nazarian's evidence on this point. The evidence before me shows that Mr. Wood attended at the Mall only once for the purpose of this retainer.

Although I have concluded that Mr. Wood unduly limited the scope of his own mandate and failed to properly review the Order to Remedy issued by the City, which required him to inspect the entire Mall, I have also concluded that Bob Nazarian failed in his responsibility to inform the engineer of important historical information about the Mall. He failed to advise him

- of the 2006 Notice of Violation;
- of the Mall's history of leaks before Mr. Wood's involvement in the Mall in 2009;
- that in 2008 the Royal Bank had suggested that a structural review of the building was necessary;
- of Mr. Clinckett's report and the work he had completed in 2008;
- of the Kleinfeldt proposal from August 2008 (see Chapter 9, December 2007 to Fall 2008); and
- that he realized very early that the Mall was a "white elephant."<sup>501</sup>

Mr. Nazarian testified that he did not believe it was his responsibility to give Mr. Wood prior engineering reports or to provide him with additional information regarding the history of leaks.<sup>502</sup> I cannot but wonder how Mr. Wood would have been able to obtain this information if it were not from the owner of the building. There was no evidence, however, to suggest that Mr. Wood requested copies of previous reports or asked questions of Mr. Nazarian that could have led to the discovery of facts relating to the history of the Mall. Although there is no doubt that Mr. Wood was less than diligent in conducting his research on the property, I conclude that Mr. Nazarian also deliberately withheld from him the prior engineering documents concerning the Mall which were in Eastwood's possession.

### **Mr. Wood does not deem it important to review the 1998 Halsall report for the purpose of his 2009 inspection**

As I discussed above, in April 2009, when Mr. Wood was hired to conduct a structural review of the former Retirement Living space, he was provided with the 1998 Halsall report but did not find it relevant to his mandate and consequently did not review it in detail.<sup>503</sup>

When asked whether the information in the 1998 Halsall report would have been useful for his October 2009 report, Mr. Wood testified:

A. It would.

Q. But you don't recall whether you used it?

A. I had far greater issues to look at than this report. This was a preliminary report that I don't know who it was written for and it had got placed in a file that ... I wasn't looking at that area at that time.<sup>504</sup>

In my opinion, the report of another structural engineer written 10 years before on the same issue he was asked to investigate should have been of interest to Mr. Wood, at least so he could familiarize himself with the project as he had indicated to Bob Nazarian he intended to do. The other engineers who testified all agreed that the receipt of previous engineering reports would have been helpful and informative. Mr. Wood's professed indifference to previous relevant reports is absurd.

### **Gregory Saunders would have done it differently**

Gregory Saunders, an engineer and the former partner of Mr. Wood, testified that he did not see the September 2009 Order to Remedy.<sup>505</sup> He was not aware that the City of Elliot Lake's Property Standards By-law required that a building be structurally sound and capable of sustaining its own weight and any load to which it may be subjected.<sup>506</sup>

Mr. Saunders testified that the Order to Comply, which required that an engineer inspect the entire Mall, was a very large undertaking. He testified as follows:

- Taken literally, the order required that the entire Mall be inspected. However, even in an inspection of the entire Mall, not every single connection, beam, and brace would be inspected, but rather a random sampling based on the history and the drawings would be inspected.
- The Order to Comply did not suggest that the inspection could be limited to a visual inspection of several areas. The order pointed out the areas that had been identified by the building inspector to require an inspection, but the City also wanted an engineer to decide if there were other deficiencies elsewhere.<sup>507</sup>
- To fulfill the obligations set out in the Order to Comply, Mr. Wood first had to determine whether the structural integrity of the building had been properly maintained.
- If Mr. Wood determined that the structural integrity of the building had not been properly maintained, then he was to prescribe a method to fix it.<sup>508</sup>
- The Order to Comply required an inspection of the building to determine if it was watertight; and if it was not, then the engineer inspecting the building was to prescribe the method to remedy the deficiency.<sup>509</sup>

I accept Mr. Saunders's evidence as the correct approach that should have been followed by Mr. Wood in fulfilling the requirements of the Order to Remedy.

### **October 5: Mr. Wood fails to conduct an adequate inspection**

On October 5, 2009, further to his letter of September 29, 2009, confirming his retainer with Eastwood, Mr. Wood attended at the Mall to conduct an inspection. He subsequently wrote a report dated October 28, 2009, which he provided to Eastwood.<sup>510</sup>

### **Mr. Wood fails to review the past M.R. Wright reports about the Mall**

Mr. Wood provided the following evidence with respect to his knowledge of the history of the Mall before the inspection:

- Based on his experience, or lack thereof, with buildings of similar design to the Algo Mall, he was not expecting to see any rust or corrosion of any kind at the Mall;<sup>511</sup>
- When he attended at the Mall, he was looking for the areas where he had been advised there were leaks. He did not expect the leaking to have been going on for an extended period, as he subsequently learned had been the case.<sup>512</sup> He testified that Ms. Laroue told him previously that there was leakage, but he did not realize that the Mall had been leaking for more than three or four years. He did not ask anyone if his assumption was accurate because (he said) there was no one to ask;<sup>513</sup>
- For the purposes of preparing the October 2009 report, he did not look in the M.R. Wright files to see if they included any previous reports relating to the Mall. Mr. Wood testified that he did not know of the existence of the previous reports;<sup>514</sup>

- At the time of his inspection and subsequent report in 2009, he was not aware of the 2005 report prepared by M.R. Wright, which specifically identified leaks in the Library that, as of 2005, had been occurring for 16 years;<sup>515</sup>
- If he had known there had been leaks in the Library for 16 years, he would have gone to the Library during his inspection to see what effect the long-term leakage had on the structure, although the Library was not an area to which he had been directed;<sup>516</sup>
- Anyone reading the 2005 M.R. Wright report on the Library would have known that it was the parking deck which was causing the leaks and the mould inside the Library; Mr. Wood also agreed that one would not have to be a structural engineer to know that water and salt leaking into a structure is not good.<sup>517</sup>

This failure to review previous reports was yet another lost opportunity on the part of Mr. Wood to inform himself of the history of the Mall and, particularly, the history of the leaks.

### **Mr. Wood conducts an initial structural review by simply examining the original drawings and plans**

Mr. Wood testified that he read the Order to Remedy and understood that he had to review the entire Mall and examine its structural integrity. He testified that this task involved an initial review of the original structural and architectural plans of the building. He noted that the plans were prepared by an architect registered and licensed in Ontario, were in good condition, and had been submitted for review to the Office of the Fire Marshal and the Ministry of Labour. Mr. Wood explained that he was extremely pleased that there was a full set of drawings to review because it gave him a great degree of confidence that the structure had been built in accordance with the regulations applicable at the time.<sup>518</sup> He testified that it appeared as though the building had been constructed in a structurally sound manner.<sup>519</sup> This conclusion was solely based on his review of the plans and not the actual as-built condition of the Mall.

Mr. Wood agreed, however, that the Order to Remedy required him to do more than just look at the original design because the building might no longer be in the same condition as it was 30 years before.<sup>520</sup>

### **Mr. Wood visually inspects only the areas identified in the order – he does not inspect the entire Mall**

When he attended at the Mall to conduct his inspection, Mr. Wood brought with him a tape measure, a flashlight, and a notepad. He testified that he may have had some other tools in his vehicle.<sup>521</sup> Although he claimed he would have taken notes during his inspection, detailed notes were not produced to the Commission.<sup>522</sup> The only ones produced were summary in nature and provided no indication of the precise locations inspected.<sup>523</sup> No one else from his office attended at the Mall with him for the inspection.<sup>524</sup>

Mr. Wood testified that, during the course of his inspection, he did not observe any leakage despite the fact that the pictures included in his report showed water ponding on the roof.<sup>525</sup> He said that, at the time of his inspection, he was told there were leaks in the Mall, and, in fact, the Order to Remedy identified the areas that had leaks. Following his review of the drawings, Mr. Wood testified, Mr. Yakimov took him on a tour and showed him the specific areas he (Mr. Yakimov) was concerned about – the same ones listed in the Order to Remedy.<sup>526</sup>

Mr. Yakimov, in contrast, testified that he was not with Mr. Wood during the inspection and that he met with him only before and after it took place. It was his evidence that, when they met beforehand, he brought to Mr. Wood's attention those areas that the City had inspected.<sup>527</sup> Whether Mr. Yakimov was with Mr. Wood during the entire inspection is of little importance. What is clear from the evidence is that Mr. Wood chose to inspect only those areas mentioned in the deficiency list and not the entire Mall, as directed by the Order to Remedy.



Mr. Wood testified that, although he recognized that the Order to Remedy required that the entire Mall be inspected, he did not do so because

[w]e determined it was not necessary on the basis of the fact that the building, as I stated, was designed by professionals, registered by the professional body of Ontario, and registered by the Architectural Association of Ontario. I wasn't ... under any requirement to second guess those professionals. I accepted their ability and I accepted their knowledge and I accepted the fact that they were registered.<sup>528</sup>

When asked why he would not have taken a closer look at the Mall to determine if the building was still as fit as shown in the architectural and structural drawings of 30 years earlier, Mr. Wood testified:

[W]ith due respect the deficiency noted specific areas with the mall. I was taken to those specific areas by people that ... work in that Mall. The maintenance staff. And I relied on their expertise to show me the areas of concern that they'd already shown to the building officials. I don't expect to have to go and look at every nook and cranny when they've got a specific shopping list already in their hands.<sup>529</sup>

When it was pointed out to Mr. Wood that the Order to Remedy specifically provided that the City had identified the list of deficiencies to be remedied but also wanted an engineer to see if there were any additional deficiencies and to prescribe the correction for all of them, he responded:

A. If you take it in the plain English that you lawyers use, I would agree. But in the plain English of a structural engineer, there is no point in digging up every foundation; there's no point in breaking into every piece of concrete to check if the rebar is there; there's no point in doing all these things because the building has been built ... under the design, care and supervision of a Registered Professional Engineer. That's what we rely on. That's what the public relies on.

Q. Well, what do you need an inspection for then if all you can rely on is the original design?

A. I was inspecting the areas of concern that related to the fact that water was leaking into the building.<sup>530</sup>

Mr. Wood appeared to have put a great deal of faith on the stamps on some drawings to determine that the building was structurally sound. In my view, this approach to determining the structural integrity of a building is dangerous. Mr. Wood failed to take into consideration the fact that, after 30 years, a building may no longer have the same structural integrity as it did the day it was built on account of numerous factors, including water leakage and alterations made to the structure with or without a building permit and with or without proper engineering supervision. Mr. Wood's rather blind faith in the drawings allowed him to disregard the realities of the as-built condition of the Mall, which included

- the lack of supervision by James Keywan (the Mall's architect) during the course of construction;
- the lack of coordination between the trades owing to the failure by Algocen to have retained Mr. Keywan to fulfill the role of the prime consultant; and
- the fact that Mr. Keywan signed and sealed the Certificate of Substantial Compliance despite the fact that, as he testified, he had never set foot on the project site or inspected the building during construction.

Mr. Wood testified that he conducted a "visual" inspection of the Mall because the general procedure, according to him, required that initially a visual inspection be carried out to determine if it is necessary to go further. Mr. Wood alleged that he tried to get the history of the building sorted out; that he asked for the available data in the possession of the Mall; and that he was "ecstatic" when he was provided with a full set of drawings, both structural and architectural. Mr. Wood also testified that he had information from people who worked in the Mall daily and took him around and showed him the problems they were having. He disagreed that he looked only at the areas listed in the Order to Remedy. He stated that he looked everywhere he went, including the parking deck. "I looked for things that they didn't show me," he testified, "but nothing really came to mind."<sup>531</sup>

As I indicated above, Mr. Wood confirmed that he did not ask anyone how long the water had been leaking into the Mall and stated that workers' memory was limited to their time at the Mall.<sup>532</sup> The irony is that Mr. Wood had a piece of the history of the Mall in his file. Indeed, as I also indicated, had Mr. Wood reviewed the 1998 Halsall report, he would have learned that the Mall had been leaking for decades.

It was suggested to Mr. Wood by counsel that, in light of the fact that he did not know how long the Mall had been leaking, it would have been better to be cautious rather than assume that nothing was wrong. He responded by diverting responsibility onto the City: if the Mall had been leaking earlier, there would have been an earlier Order to Remedy. Mr. Wood testified that because the City was in the Mall daily, looking at renovations in the building throughout the years, and because there was no Order to Remedy until 2009, he was justified in concluding that the leaks were a new problem.<sup>533</sup>

This evidence is disingenuous. It was an attempt by Mr. Wood to deflect any blame for failing to conduct the thorough investigation required by the Order to Remedy.

Mr. Wood testified that the leakage known to the Mall employees drove his inspection because these employees guided him during his inspection.<sup>534</sup> Mr. Wood did not inspect the areas where there was no indication of leakage (e.g., where there was a pristine drywall or a clean, unstained ceiling tile).<sup>535</sup> Mr. Wood agreed that waiting for water stains to appear on ceiling tiles and drywall was of little help.<sup>536</sup>

Mr. Wood also testified that, during his inspection, he might have taken some measurements of flanges. He testified that he went up above the ceiling tiles and was close enough to touch the beams. He may have measured the flange width to see whether it was comparable to the drawing, but he acknowledged that, because he was more concerned with what the leakage was doing to the structure, he did not do a detailed review.<sup>537</sup> Despite this claim, he never provided any warnings about the consequences of failing to stop the leaks or the long-term effect of salt-laden water leaking onto the steel structure.

Mr. Wood testified that he was not expecting to see any rust or corrosion of any kind at the Mall. Notwithstanding this statement, he was altogether unconcerned by the rust he did discover. His main concern was that the original fireproofing had fallen away from the steel beams.<sup>538</sup>

He confirmed that he would have been prepared to recommend that something more than a visual inspection be carried out if he had seen something that warranted such a recommendation.<sup>539</sup> Unfortunately, Mr. Wood would never make this recommendation, and the City would not order it either.

### **Mr. Yakimov advises Mr. Wood of his concerns over the vibration**

Mr. Wood testified that, during his inspection, he went up onto the parking deck with Mr. Yakimov, who expressed concern about vibration felt in the area of the deck. It was Mr. Wood's recollection that they went to the area of the eventual collapse to review the vibrations. Mr. Wood testified that he and Mr. Yakimov stood in the area for about 10 to 15 minutes: although several vehicles drove by, neither of them felt any vibrations. Mr. Wood testified that he subsequently explained to Mr. Yakimov that structures routinely deflect under load, and especially under wheel load that is moving across the deck. Mr. Wood did not see anything that was out of the ordinary while he was standing on the parking deck.<sup>540</sup> The vibration of the structure did not concern him.

Mr. Yakimov testified that he advised Mr. Wood that he thought the vibration or movement was a safety issue.<sup>541</sup> Mr. Wood, however, denied that Mr. Yakimov had told him that. He testified that Mr. Yakimov never really quantified or identified what he was concerned about in the area. The engineer said that he assumed Mr. Yakimov was concerned about the deflection under load. Mr. Wood further testified that, following his conversation with Mr. Yakimov, he did a check on the beam at gridline 16 (the one that eventually collapsed),

performed some quick calculations, and determined that the deflection was acceptable for a structure subjected to moving loads. He also took a picture of the underside of the beam in question.<sup>542</sup>

Mr. Wood did not include any reference in his report to the concerns relayed by Mr. Yakimov or his findings on them because he did not consider those issues to be of consequence.<sup>543</sup> He denied that he excluded Mr. Yakimov's concerns from his report because it was outside his mandate. Further, Mr. Wood disagreed with Mr. Yakimov's concerns that the movement could have been related to the condition of the connection in the area – because, Mr. Wood said, connections do not deflect; they do not move. Mr. Wood disagreed that a weakened connection could result in movement of the structure.<sup>544</sup>

It is not for me to evaluate and determine the cause of the vibrations and/or movement noted by Mr. Yakimov. NORR ultimately concluded that although there was a two-stage failure in the area of the collapse, the first failure likely did not occur as early as 2009 and an early failure was not the likely explanation for the phenomenon reported by Mr. Yakimov. This issue is explored further in Chapter 3, Causes of the Collapse. Mr. Wood's response to Mr. Yakimov's concerns has been included to illustrate the cavalier manner in which Mr. Wood conducted his inspection and dismissed concerns brought to his attention.

Mr. Wood should have done more than what in my view amounted to "calculations on a dinner napkin"; he should have taken the time to actually inspect the conditions brought to his attention. If he recommended further investigation and Mr. Nazarian refused to provide him with this mandate, then it would have been incumbent on him to notify the City. He was there to respond to the requirements of an order issued by the City.

### **Mr. Wood fails to inspect the connections in the Mall**

When asked whether he looked at the connections during his inspection, Mr. Wood claimed he did and that he included photographs of connections in his report. He testified that picture 4 in his October 28 report depicted a steel beam connected into a stiffener plate above the yellow tarp. The photograph, however, made no reference to the connection. The report was also silent on this point. Mr. Wood identified a further photograph he had taken,<sup>545</sup> although it was not included in the report, which, he testified, showed a beam and connection with a bit of white effervescence. When asked whether he took these pictures because he was looking at the connections, he stated that "[he] happened to take a picture of where there was leakage. There happened to be a connection there." He then attempted to justify his actions by stating that "most of the leakage ... is at the mid-span of structures, because mid-span is where the structure deflects, it's where the water ponds and it's where it primarily leaks. So that's where I was mostly looking in areas where there are no connections."<sup>546</sup> He testified that, during his inspection, he noted that the leakage tended to be at mid-span and that most of the places he was taken to were areas where the fireproofing had fallen off the mid-span of the beam members.<sup>547</sup>

Mr. Wood was never able to explain why, if the leakage had occurred at mid-span of the beam, the NORR engineers had found so many heavily corroded connections.<sup>548</sup>

Mr. Wood testified that he had calculated that there were 2,170 connections (beam to beam, beam to column) within the Mall and more than 800 connections within the bracing of the structure. In his view, more than 80 percent of the connections were covered with sprayed-on fireproofing and totally concealed. He testified that, in light of the number of connections and the difficulty in seeing them (because of fireproofing), it was necessary to restrict the inspection of a building to the areas where leakage had occurred or was known to be occurring.<sup>549</sup>

Mr. Wood agreed that within an angle connection there would be less steel to corrode because the angle is not as thick as the other components in the structure.<sup>550</sup> He agreed that the angle connection would become structurally weaker more rapidly than the beam and column as a result of water and chloride infiltration and corrosion.<sup>551</sup> Despite this acknowledgement, he never agreed that it was an error on his part to have ignored the



connections. Instead, he persisted in holding to a complicated explanation to support his thesis that there was no water leaking at the location where the connection failed.

It was put to Mr. Wood that Chris Hughes, the architect on the NORR panel of engineers, had testified that the drawing S4 showed an elevated ridge in the area of the collapse, running north and south in the middle between gridlines FX and G, and that the elevated portion of the surface of the parking garage directed water toward the west and east.<sup>552</sup> Although he had conducted an initial structural review by reviewing the drawings and the original plan, Mr. Wood testified that he was not aware of that detail at the time. He agreed that this detail is what was shown on the architectural drawing. It was suggested to Mr. Wood that the elevated portion of the surface of the parking garage would have directed water to the connection that failed. In response, Mr. Wood testified that the architect had attempted to direct water in that direction but that the deflection of the beam under dead and live load would have counteracted the topping, such that it was not possible for the water to drain that way. As support for his position, he pointed to the fact that a drain had been introduced in the area to take away water that was ponding in the area.<sup>553</sup>

Mr. Wood agreed that the camber in the precast concrete slabs is in the mid-span and would run north–south. He further agreed that a camber in the mid-span of the slab would be directing water north and south to the beam at gridline G-16. Notwithstanding his agreement with these propositions, Mr. Wood maintained in his evidence that no water would have gone to the connection because the beam at gridline G-16 was a particular type that was 24 inches deep and weighed 110 pounds per square foot. He testified that this beam would sag under the dead weight of the concrete and would sag under a live load. It was his evidence that the deflection under dead load was comparable to the sloped topping that the architect had specified, causing the water to go toward the mid-span. He agreed that his explanation did not take into account the water being directed by both the precast slab and the ridge down the middle toward the western side of the area.<sup>554</sup>

It concerned me during Mr. Wood's testimony that he was so rigid in his position and unwilling to acknowledge the obvious. There is little doubt the water leaked at the connection, and there was no evidence to the contrary. However, Mr. Wood refused to accept that the explanation requiring the fewest assumptions is most likely to be correct.

### Mr. Wood inspects the beam that collapsed

During his inspection of the lottery kiosk area, Mr. Wood inspected and photographed the beam on gridline 16 – the one that ultimately collapsed. The photograph is included in his report at picture 6 (see figure 1.10.8).

Mr. Wood testified that the area of the beam at gridline 16 showed the worst evidence of leakage in that zone. Part of the fireproofing had fallen away, exposing the steel beam. He testified that the red colour in the photograph was partially red-oxide paint and partly rust, which was not an indication, in his view, that it was a major structural problem. He testified that the area that looked worse was the leakage through the joint between the slabs, which he identified as the top right area of the photograph.<sup>555</sup>



**Figure 1.10.8 Rust and missing fireproofing on the beam at gridline 16 – the one that later collapsed**

Source Exhibit 103

He explained that the beam at gridline 16 was 34 feet long, that the other two ends of the beam were above the drywall ceiling, and that there was no indication of any problems with the drywall ceiling.<sup>556</sup> He testified that, given the location of the beam, he could not visually observe the connections. He would have had to remove the fireproofing in order to see them.<sup>557</sup> Mr. Wood admitted, however, that, in hindsight, he should have gone to the Mall while the fireproofing contractor was present, had him remove the fireproofing from the connections of the beam at gridline G-16 for inspection, and then had the contractor replace the fireproofing. Mr. Wood claimed it never occurred to him to proceed in this manner because the water damage that could be seen was in the mid-span of the beam. He agreed that, in hindsight, with his current knowledge, it would have been a “brilliant” idea to look at the connections.<sup>558</sup>

Although it is difficult for me to determine the extent to which Mr. Wood could have examined the connections, his failure to make any attempt to look at any of them or to recommend a more in-depth review clearly fell short of his obligation to conduct a thorough review of the entire Mall, as he was expected to do. Furthermore, in his exchanges with examining counsel, I was struck by his defensive and unapologetic attitude about the issue.

## **October 28: Mr. Wood concludes that there are no structural concerns with the Mall despite the fact that it has been leaking for more than three decades**

### **Mr. Wood submits his report: He finds no structural concerns and provides no solution for the leaks**

Following his October 5, 2009, inspection, Mr. Wood prepared a report for Eastwood, dated October 28, 2009.<sup>559</sup> Although the report had a notation marked “draft report” on the first page, Mr. Wood testified that it was an error – the notation was put on that page when it was submitted to the client and never removed. Mr. Wood confirmed that the report was not revised after October 28, 2009. The last page of the report is signed and sealed by Mr. Wood and therefore showed, according to him, that it was intended to be a final report.<sup>560</sup>

In his report, Mr. Wood described the scope of his work:

As per your request we visited the above noted Mall Complex on Monday, October 5, 2009, to specifically review and report on concerns that water leakage through the parking deck may have created a weakening of the structure and damaged the required sprayed-on fireproofing of the steel structure.<sup>561</sup>

He did not deem it necessary to make reference in his report to the Order to Remedy because, according to him, the order had not been addressed to him.<sup>562</sup>

According to Mr. Wood, he was not retained to review the leakage or the cause of the leakage, or to remedy the leakage. He was retained only to review the structural concerns as they were related to the leakage that had occurred previously. He had not been retained to prescribe the manner in which the leaks were to be fixed, nor was he asked to comply with the order. A copy of the Order to Remedy was sent to him only as information.<sup>563</sup>

I find this interpretation by Mr. Wood of his scope of work not only unduly restrictive but also unreasonable.

Mr. Wood went on in his report to make the following observations:

The review of the building consisted of a visual inspection in areas of significant leakage within the Mall below the parking deck ...

At the time of our inspection the installation of additional caulking and waterproofing repairs were still in progress on the parking deck over the Zellers Store at the south end of the Mall ... Efforts over the years appear to have attempted to waterproof the mall utilizing the concrete topping and the noted caulked joints located over joints in the precast slabs with no waterproofing members ...

From the mall ceiling tile it is evident that many leaks have occurred over the years. We attempted through inspection to review the condition of structural steel and precast concrete in the most severe areas of leakage as follows:

**1) Zellers Store ...**

There are several leakage areas, within the Zellers Store predominantly at grid lines. Our inspection revealed that grid line 5 was the most severe. At this location elaborate collection systems have been installed above the suspended ceiling to collect water infiltration through the roof structure ...

The structural steel is not fire-rated throughout Zellers. The primer painted structural steel has surface rusting, but in all areas inspected no loss of steel section was observed.

**2) Service Corridor North and West ...**

Water leakage has occurred into the perimeter corridor structure around the upper mall mostly at steel beam support locations, where there is a joint in the precast slabs. Water has soaked the sprayed-on fireproofing ...

The steel is rusting particularly on the top of the bottom flange, however, we are of the opinion that the rusting has not created any structural loss of beam capacity. We could not inspect the underside of the precast slabs, due to the covering of foil faced fiberglass insulation.

**3) Main Mall at Ticket Kiosk ...**

The steel beams along Line 16 are in a location of significant previous water leaks. ...

Similar to other areas inspected much of the exposed steel has only minor surface rusting with exposed original primer paint, where the fireproofing has fallen off due to water saturation.

... No deterioration of the precast slabs was observed.

**4) Mall Area East of Hotel**

Beams in areas of leaks over the Bargain Shop have fireproofing missing on bottom flange of steel beams. No loss of section of the steel beams was observed.<sup>564</sup>

Mr. Wood then concluded:

Based upon the above it is our opinion that our inspection revealed no visual structural concerns both with the structural steel or prestressed slabs. The positive camber on the slabs appear [sic] to inhibit surface drainage. This indicates structurally that the slabs have significant additional load carrying capacity.

Our major concern is the loss of fireproofing on the bottom flange of steel beams that are required to have complete fire protection. We are recommending that in areas where the original fireproofing has fallen away that the top and bottom surfaces of the bottom flange be cleaned off and suitably sprayed with a fireproofing product that is not water absorbent.<sup>565</sup>

Mr. Wood testified that the area with the most extensive leakage was in the Zellers store. It was in this area that he observed evidence of extensive ponding on the roof deck and the most leaking in the structure.<sup>566</sup> When asked how he could observe, as he noted in his report, that there was no loss of section in all areas inspected throughout Zellers, Mr. Wood explained that if steel still had the primer paint on it, then there was no loss of section.<sup>567</sup> He explained that the beams in the Mall were “massive, wide flange and welded wide flange beams,” and that “surface rust does not affect that thickness of steel.”<sup>568</sup>

Mr. Wood testified that he did not take any measurements of the flange in picture 6 (figure 1.10.9), which depicted the beam that actually collapsed). Although it had some corrosion, he did not see any need for measurements. The corrosion he observed was not the type that he would associate with loss of section.<sup>569</sup> He testified that the issue of whether to measure the corrosion was a judgment call to be made by the inspector, based on his training in that sort of procedure, and in this instance he did not see anything within the building that gave him concern.<sup>570</sup>



Mr. Wood did not include in his report any indication that there were areas he had not inspected as a result of their being obstructed by various materials. He testified that “the materials that excluded the visual examination were materials that would have been damaged by water penetration ... and would show up as an area that ... should be inspect[ed].”<sup>571</sup> Although this explanation might be the case, it would seem to me that an indication from Mr. Wood in his report that he did not inspect any areas other than those noted in his report would have been useful. Furthermore, being an experienced engineer, Mr. Wood should have known that there was a possibility that the owner might have deliberately masked any sign of water infiltration, as was Bob Nazarian’s practice, and that he could not simply rely on a visual inspection to determine whether leaks were occurring. That was particularly so with this Mall, given that Mr. Wood should have been aware that the leaks had been ongoing for a number of years, as noted in his report, and given the information in his possession.

### **Bob Nazarian reads the report and does not follow up with Mr. Wood – even though his report did not indicate that he inspected the entire Mall**

Bob Nazarian testified that he read Mr. Wood’s 2009 report at the time. He agreed the report was done in response to the Order to Remedy issued by the City against Eastwood. In his view, because he had given a copy of the order to Mr. Wood, the issue was one between the City and the engineer. If the City was not satisfied with the report, it could have asked the engineer to inspect more areas. He admitted that if he had given the order to an engineer and asked him to do what it said, and if the engineer came back after inspecting only one beam in only one area, he would not have been in compliance with the order. He insisted, however, that he did not normally “follow engineers” when they were doing their inspection.

In this case, despite having read the report, being aware that he had been ordered to have the entire Mall inspected, and knowing that the engineer had not inspected the entire Mall, Mr. Nazarian did nothing.

Mr. Nazarian nonetheless admitted that he has no hesitation about contacting engineers and asking them to change their reports. In this case, despite having read the report, being aware that he had been ordered to have the entire Mall inspected, and knowing that the engineer had not inspected the entire Mall, he did nothing. He claimed that he left the matter to be dealt by his lawyer and the engineer to satisfy the City. He felt he met his responsibility by hiring an engineer to do the job and giving him a copy of the order.<sup>572</sup>

Levon Nazarian testified that he saw the report in late 2009 or in 2010 and gave it to potential purchasers. He never asked anyone why this report had been obtained.<sup>573</sup>

### **Mr. Fabris admits his letter may have affected the scope of Mr. Wood’s work**

Mr. Fabris testified that he received Mr. Wood’s 2009 report in or around December 2009, but that he never discussed the report with Bob Nazarian.<sup>574</sup>

During cross-examination, Mr. Fabris admitted that it was apparent from a review of Mr. Wood’s report that the engineer had not conducted an inspection of the entire Mall and had limited his inspection to the most severe areas. Mr. Fabris also admitted that there was a connection between the instructions he gave Mr. Wood in his letter of September 28, 2009 – to look specifically at the areas listed in the deficiency portion of the order – and the report produced by Mr. Wood.<sup>575</sup>

## October–December: Despite not meeting the requirement of the order, City staff accept Mr. Wood's report, advise council that the Mall has no structural problem, and ignore the requirement to fix the leaks

### City staff are advised of Mr. Yakimov's structural concerns, but they do nothing

On October 28, 2009, Chief Officer emailed an update to Mr. Ewald, copying Mr. Bauthus, Mayor Hamilton, and Mr. Connors, on the various outstanding issues involving the orders issued to Eastwood and occurring since the meeting with Bob Nazarian and his lawyer on September 25, 2009.<sup>576</sup> In his email, Chief Officer noted three issues: (1) Hotel retrofit; (2) Offence Notice re: missing fireproofing on steel beams; and (3) structural integrity of water-exposed beams (rust). He also advised them that he had met with Dimitri Yakimov on the same day, October 28. He described his meeting as follows:

Dimitri [Yakomov] came in at 11:00 a.m. this morning. He informed me that he has concerns with the mall, that work will not be addressed correctly as Mr. Nazarian asked him to stall the Fire Department and to use the water leak issue. Dimitri said he would not and he was let go off as of [sic] today. (This could be a sour grape issue?)

He also advised he spoke to Bruce Ewald and gave him copies of the drawings as he has concern [sic] of 2 panels on the car park level just outside of the lobby doors and also to the left of the doors. He indicated that his hotel audit and dealing with H.R. Wright [sic] inspection with Mr. Bob Wood showed that the drawings of the area in question has the core slab and 3 inches of concrete topping. Upon inspection, the area shows the core slab and 6 inches of concrete topping. He is concerned about the added weight of the extra three inches of concrete. He also indicated that there is a substantial amount of movement on this location. I asked if this new concern about the integrity of the core slab is in the scope of work for H.R. Wright [sic] and he, Dimitri, indicated that it was not.<sup>577</sup>

Mr. Yakimov testified that he did not inform Chief Officer of these things because he was bitter about being fired that day. He testified that he had learned from Ms. Laroue that Mr. Wood's upcoming report would be positive, which made him upset and worried, and led him to speak to Chief Officer.<sup>578</sup> In his view, he was fired because he raised these issues with Bob Nazarian.<sup>579</sup> Considering Mr. Nazarian's record of hiring and firing consultants who did not provide him with the answers he sought, I have no difficulty accepting Mr. Yakimov's evidence.

Chief Officer stated that he would have communicated Mr. Yakimov's concern about overloading the roof deck to Mr. Wood when he subsequently called him. Chief Officer testified that he clearly recalled speaking to Mr. Wood about this issue, even though his email refers only to speaking about the delivery of his report.<sup>580</sup>

Mr. Ewald testified that Mr. Yakimov did not speak to him and he did not give him any drawings.<sup>581</sup> He did not speak with Mr. Yakimov about the concern regarding the weight of the additional concrete or about the movement on the parking deck in that same location.<sup>582</sup> He did not call Mr. Yakimov to inquire about these issues because he was no longer employed at the Mall, and he did not look for his personal number either.<sup>583</sup> Mr. Ewald testified, however, that after receipt of the email, he spoke to Chief Officer and they both concluded that Mr. Yakimov was providing them with this information now because he had been fired.<sup>584</sup> It apparently did not occur to Mr. Ewald that perhaps Mr. Yakimov was coming forward now that he was not employed by Eastwood and therefore could not be harmed by his employer.<sup>585</sup> As a result, Mr. Ewald did nothing to investigate the issues raised by Mr. Yakimov. He did eventually speak to Mr. Wood about the additional concrete, but only after receiving his report.<sup>586</sup>

Mayor Hamilton testified that he did receive and read this email at the time and that it did cause him concern. But again he did nothing about it,<sup>587</sup> except reply to the email three days later stating that council should be advised of this recent development.<sup>588</sup>

Mr. Bauthus testified that on receiving this email, he probably talked about it with Mr. Ewald but did not do more than that because he assumed Mr. Ewald would follow up.<sup>589</sup>

Consistent with previous attitudes, City officials failed to consider the seriousness of the concerns that were brought to their attention. This was yet another missed opportunity on the part of the City to compel the owner of the Mall to undertake repairs that could have prevented the collapse or led to the Mall's closure. It is clear from the evidence that the "closure of the Mall" was an outcome to be avoided at all costs in the minds of the City officials.

### **Mr. Ewald is satisfied by Mr. Wood's report despite the fact that it does not meet the requirements of the Order to Remedy**

Mr. Wood testified that after he delivered his report to Bob Nazarian and it was passed on to the City, he did not receive any complaints from the City that the scope of work was inappropriate or not acceptable. He did not receive any instructions from any City official or from Bob Nazarian (or anyone else on his behalf) to enhance or expand the scope of his work.<sup>590</sup>

Mr. Ewald testified that he received Mr. Wood's 2009 report at the end of October but could not remember the specific date.<sup>591</sup> It appears from the documentary evidence before me that he in fact received it on October 30, 2009.<sup>592</sup>

When he was asked whether he expected the report from Mr. Wood to be a visual inspection only, Mr. Ewald testified that it was not "untypical" for a report to be based on a visual inspection. He agreed that his order required an inspection by a structural engineer of the entire Mall area to determine whether there were deficiencies, including the extent of corrosion on the steel I-beams. However, he testified that it was up to the engineer to decide how to make an assessment of corrosion.<sup>593</sup> Despite Mr. Wood indicating in his report that he had performed a "visual inspection," Mr. Ewald was of the view that Mr. Wood could have touched the steel beams and taken measurements as long as he was not doing a destructive inspection, meaning he was not removing material from the building.<sup>594</sup>

When asked whether he knew that Mr. Wood did not remove anything in order to look behind the material covering the structural members, Mr. Ewald testified that Mr. Wood could have removed waterproofing material or a ceiling tile if he was concerned. This procedure would not, according to Mr. Ewald, have been considered a destructive inspection, unlike removing drywall or removing pieces of the building to do further testing. Mr. Ewald did not know, however, if Mr. Wood had removed fireproofing during his inspection.<sup>595</sup> It was his understanding that Mr. Wood would have done whatever was necessary to inspect the entire Mall and come to a conclusion, including proceeding with destructive testing if that was what he needed to do.<sup>596</sup>

Mr. Ewald testified that he believed Mr. Wood would have inspected connections between horizontal and upright structural members in various locations, but he did not expect him to inspect every connection. Mr. Ewald knew that Mr. Wood did not look at all the connections because some of them were hidden behind drywall.<sup>597</sup>

When asked whether he would have expected Mr. Wood to remove the drywall if it was in front of a connection, Mr. Ewald testified:

Well, I'd like to clarify that ... an engineer ... and even a building inspector, for that matter, if you believe there is an issue that you can't see and you need to look at, in order to do your job properly, you can request that that material be removed.

But it would appear from his report that he didn't see any reason to proceed to that level.<sup>598</sup>



Mr. Ewald agreed, however, that Mr. Wood did not remove drywall and said he did not know whether Mr. Wood thought about the necessity to remove it. Mr. Ewald testified that he did speak to Mr. Wood after receiving his report but did not ask him whether he had looked at the connections between the upright and horizontal structural members. As Mr. Ewald explained, given that the report indicated that Mr. Wood “reviewed the steel structure, obviously the connections are part of that.” He admitted, however, that the report did not in fact refer to connections.<sup>599</sup>

Mr. Ewald testified that he communicated with Mr. Wood after receiving his report to discuss with him (1) the fact that the report had the notation “Draft Report”; and (2) the concerns raised by Mr. Yakimov to Chief Officer. Mr. Wood informed Mr. Ewald that the notation “Draft Report” was simply an oversight – he had neglected to remove it.<sup>600</sup>

As for Mr. Yakimov’s concerns, Mr. Ewald testified that Mr. Wood advised him he did not have any concerns about the additional depth of concrete in one area. Mr. Ewald could not recall whether he spoke to Mr. Wood about the movement of the roof in the area of the collapse as described by Mr. Yakimov, but agreed that, depending on the type of movement, it might have indicated a serious structural concern. Mr. Ewald testified that he did not ask Mr. Wood whether the issues raised by Mr. Yakimov were part of his scope of work. He agreed that Mr. Wood’s report did not make reference to these two concerns, but he once again assumed these issues were not included because they were not concerns. Mr. Ewald agreed, however, that he could not conclude whether these issues were in fact within Mr. Wood’s scope of work since they were not mentioned in either the report or the order.<sup>601</sup>

During his conversation with Mr. Wood, Mr. Ewald did not ask him to identify the areas of significant leakage he had inspected and did not ask him how he knew there were such areas. Despite the fact that Mr. Wood indicated in his report that the “review of the building consisted of a visual inspection in areas of significant leakage within the Mall” and “[w]e attempted through inspection to review the condition of structural steel and precast concrete in the most severe areas of leakage as follows,” Mr. Ewald testified that he believed Mr. Wood had inspected the entire Mall but reported only on areas of concerns. He did not wonder whether Mr. Wood actually had reviewed the condition of the structural steel anywhere other than the places listed (which corresponded to the areas inspected by Mr. Ewald). Mr. Ewald based this belief on the first sentence of Mr. Wood’s report (“... to review and report on concerns that water leakage through the parking deck may have created a weakening of the structure ...”) and the fact that areas of leakage were throughout the Mall.<sup>602</sup>

Mr. Ewald made numerous assumptions following his review, none of which were supported by the contents of the report. I find, as I have stated before, that the City was hoping to avoid the closure of the Mall because of the perceived impact it would have on the economy. The receipt of an engineering report that gave a clean bill of health to the Mall provided the City with the excuse to continue with the *status quo*. I am not surprised that Mr. Ewald accepted the report, despite its glaring deficiencies.

When pressed, Mr. Ewald admitted, however, that the report did not state that Mr. Wood had looked at the entire Mall and that he did not ask Mr. Wood during their conversation if he had indeed inspected the entire Mall.<sup>603</sup> Except for one picture of the parking deck, all the photographs included in the report were of the areas referred to in the order.<sup>604</sup> He also agreed that an inspection of the entire Mall to determine whether it was structurally sound would take longer than an hour and a half, and possibly more than a day.<sup>605</sup> However, he testified, he did not give any thought to the fact that Mr. Wood had been in the Mall for only one day or, indeed, whether Mr. Wood had looked at other areas.<sup>606</sup>

Despite the fact that his order noted rusted structural components outside Foodland and the main entrance as a deficiency that he required be corrected, and although there was no reference to it in Mr. Wood's report, Mr. Ewald testified that he concluded that Mr. Wood had indeed examined that area (because Mr. Ewald believed Mr. Wood had examined the entire Mall). However, it was not a concern Mr. Wood felt was worth mentioning in his report.<sup>607</sup>

Mr. Ewald admitted that, despite his order requiring that the leaks be fixed, Mr. Wood's report did not address the repair of the leaks but mentioned only that "they were working on it."<sup>608</sup> No information was received from an architect or engineer regarding how the repairs were going to be achieved by Bob Nazarian – the owner would proceed with the same methods he had always used.<sup>609</sup> Moreover, Mr. Ewald agreed that the 2006 Notice of

Violation had also required the leaks to be fixed, that the Mall had continued to leak, and that there had been unsuccessful efforts over the years to fix them.<sup>610</sup>

**I find it deplorable that Mr. Ewald did not exercise his powers and request a further and better engineering report that actually addressed the deficiencies he had outlined in his Order to Remedy. Although the City this time, unlike in 2006, had an engineering report, it did not address the crux of the problem: the leaks.**

Mr. Ewald admitted that he did not call or write to Mr. Wood to inquire what was involved in his visual inspection.<sup>611</sup> He also did not speak to Mr. Wood about the scope of his work. It did not occur to Mr. Ewald that the scope of that work was insufficient to answer the questions set out in the order.<sup>612</sup> He did not speak to Mr. Wood before issuing the letter in February 2010 rescinding the order.<sup>613</sup>

I find it deplorable that Mr. Ewald did not exercise his powers and request a further and better engineering report that actually addressed the deficiencies he had outlined in his Order to Remedy. Although the City this time, unlike in 2006, had an engineering report, it did not address the crux of the problem: the leaks.

### **A re-inspection by the Fire Department reveals that no action has been taken on the missing fireproofing**

On October 30, 2009, Mr. Connors of the Fire Department conducted a re-inspection. He noted in his re-inspection report that the missing fireproofing had not yet been replaced. However, he gave Eastwood 15 days from November 5, 2009, to provide a schedule of compliance and 30 days from November 5, 2009, to complete the work outlined in the M.R. Wright report.<sup>614</sup>

### **City Council is advised of Mr. Yakimov's concerns**

On November 3, at the urging of Mayor Hamilton, Mr. Bauthus forwarded the report of Chief Officer dated October 28 to council members, copying Chief Officer and Mr. Ewald. He stated: "Staff is following up with the mall to ensure that there is the follow through on the items that require addressing."<sup>615</sup> Mr. Bauthus informed council of these significant issues of concern. Six days later, City Council voted to execute the Library lease. Mr. Bauthus testified that he did not remind council during that discussion that the dispute with the Library was all about the leaks and the resulting damage. He also failed to discuss with council whether the Library's concerns might be legitimate, given the Order to Remedy issued by the chief building official and these recent developments.<sup>616</sup>

Despite the reference to the structural integrity of the Mall in Chief Officer's report, Mr. Collett testified that he thought the report from Chief Officer had more to do with fireproofing and fire regulations than with structural integrity.<sup>617</sup>

**Mr. Ewald does nothing to ensure that the leaks have been fixed; he concludes that, because no water entered on the day he was in the Mall, everything is fine**

On November 12, 2009, Mr. Ewald sent a letter to Mr. Nazarian in which he wrote:

Dear Bob,

On October 30, 2009 pursuant to a Property Standards Order issued on September 25, 2009 I received a draft report from MRW Consulting Engineers pertaining to deficiencies at the mall. At this time I have not received an Application to Construct along with the information required for the issuance of a permit. It is imperative that these deficiencies be corrected as soon as possible. I would request that the pertinent repair details be prepared by your engineer and submitted to this department along with an application to construct so that a permit can be issued and the work undertaken as quickly as possible. Failure to comply will result in prosecution.<sup>618</sup>

Mr. Ewald explained that he sent this letter because he had not received an application for a building permit to fix the leaks and rusted areas, according to his order of September 25, 2009. He testified that he received an application only for the fireproofing material.<sup>619</sup> When asked whether he ever received a building permit application to fix the things in his order, he testified:

A. The methods they were using for the leaks did not require a building permit, and obviously to clean or paint steel, that wouldn't require a permit, as well, but the fireproofing definitely required a permit.

Q. You wrote this letter and you told him that what – that fixing what you put in the Property Standards order, which you just told me meant the leaks and the rusty steel, needed a building permit. Did you ever ... change your mind about that?

A. If they had used a different methodology in the repairs of ... the roof, it would have had to have been ... determined whether or not a permit was required.

Obviously, if they had all of a sudden decided that they were going to a membrane and three inches of asphalt wear course, yes, that would definitely require a building permit.

Q. But this letter says they need a building permit. It doesn't say you need a building permit depending on what you do. It says you need a building permit, period, full stop. That's what it says; right?

A. You're absolutely correct. That is what it says.

Q. Did they ever write you and tell you: Here's what we're doing and here's why we don't need a building permit?

A. I don't believe they put it in writing, no.

Q. Were you told orally what they were doing?

A. I was aware of what they ... were doing, because I had been over to take [sic] look at it. I don't have a distinct recollection ... of the conversation or who would have told me, but I was aware that they were proceeding to clean the grout lines and re-caulk.

Q. And that didn't need a permit?

A. No.

Q. Did you ever write them and say:  
Okay. Sorry, I was wrong. You don't need a permit?

A. On that occasion, no. On another occasion, I did.<sup>620</sup>

Mr. Ewald was not able to confirm whether work on the leaks was performed after he sent this letter.<sup>621</sup>



On November 17, 2009, Mr. Ewald spoke to Ms. Laroue about the Order to Remedy and made the following note about his conversation:

Spoke to Henri at the mall at 3 pm regarding outstanding issues pertaining to the order issued September 25, 2009. She indicated that an individual was coming in to price the application of the fireproofing to the steel beams where req'd. She also indicated that MRW Engineering would be preparing a report with regards to surface preparation and installation of the fireproofing. I also asked Henri to ensure that all other items on the order be completed immediately. Henri said she would attend my office tomorrow in order to start the permit application process.<sup>622</sup>

At the time of this conversation, Mr. Ewald was not sure whether the leaks had been repaired, but he recalled doing a "loose" inspection of the Mall on a rainy day in November. He did not have notes of this inspection, was not accompanied by anyone, and was not in the Mall for longer than half an hour. He visited the halls outside the Library and Scotiabank but did not go inside the Library, Scotiabank, or Zellers. He did not speak to anyone during this inspection. Mr. Ewald testified that he "saw nowhere that there was ... water coming in" and therefore concluded "that what they had been doing with regards to the caulking was working, and that they had stopped up the leaks at that point in time." Mr. Ewald admitted, however, that he was not aware that throughout the entire period since the Mall had been built the leaks would periodically improve and then get worse again. He never took any steps to learn about the Mall's history of leaks. Nonetheless, on the day he visited the Mall in November, he believed that the order had been complied with in regard to fixing the leaks.<sup>623</sup>

I am surprised by Mr. Ewald's conclusion considering that nothing new had been done by the owner to permanently fix the leaks except to do what had been done for the past three decades. Furthermore, it is apparent from the evidence before me, including the complaints from the Library, that the leaks in fact never stopped until the day of the collapse.

### **Council is advised that the M.R. Wright report concluded that there is no structural problem with the Mall, but it is not told that the leaks had been fixed**

On November 18, 2009, Chief Officer followed up on his report of October 28, 2009, about the concerns by emailing Mr. Bauthus and council members, with copies to Mr. Ewald and Trudy Rheame, the coordinator of the Fire Department. He wrote: "Just an update on the Mall concerns. They have supplied the Engineering report from M.R. Wright that does not have any concerns with the structural components of the building that have been subject to the leaks all these years."<sup>624</sup>

Mr. Bauthus recalled speaking to Mr. Ewald about the M.R. Wright report, but not actually reading it himself. Mr. Ewald told him that there were no structural issues. Mr. Bauthus admitted that the Mall continued to leak and therefore the order had not been complied with. He did not take steps to deal with the non-compliance or to ask Mr. Ewald about the matter – leaving it to be handled by Mr. Ewald, who was knowledgeable in that area.<sup>625</sup> However, he recognized that Mr. Ewald had not taken an interest in the situation until Chief Officer's email on September 23, when Mr. Bauthus called Mr. Ewald into a meeting. Nonetheless, Mr. Bauthus testified that he did not think at the time about following up with Mr. Ewald.<sup>626</sup>

Mayor Hamilton agreed that the report from Chief Officer did not indicate that the leaks were fixed. In fact, the mayor did not believe that the leaks had been fixed.<sup>627</sup>

After the receipt of the report from Mr. Wood, the City was no further ahead than it had been on September 23, 2009. It had no report from an engineer or architect that addressed the issue of the leaks and recommended a method or repair, or certified that there was no issue with the structure with respect to watertightness.<sup>628</sup> As Mr. Ewald admitted, all it had was a report from an engineer stating there was a problem that needed to be dealt with.<sup>629</sup>

## **A building permit is issued to install fireproofing, but no work is done to fix the leaks**

On November 25, 2009, Mr. Ewald signed a building permit issued to Bob Nazarian “to patch existing i-beams with fire retardant spray-on material.” There was no reference in the building permit application to fixing the leaks.<sup>630</sup>

## **Mr. Ewald focuses on fireproofing and forgets about the leaks**

It is apparent from the evidence before the Commission that, following the issuance of the Order to Remedy, the City did nothing to satisfy itself that indeed the leaks had been fixed, apart from Mr. Ewald’s “loose inspection.” Its focus was on the *Fire Code* violations. But what is more perplexing is the fact that even Mr. Ewald, whose role as chief building official and property standards officer should have been to focus on the structural integrity of the Mall as well as its watertightness, was interested only with ensuring that the fireproofing was being applied to the areas where the leaks had caused it to be dislodged.

On December 1, 2009, Ms. Laroue reported to Mr. Fabris that Mr. Ewald had gone to the Mall to inspect the work being done by the company hired to spray the fireproofing material. She informed Mr. Fabris that Mr. Ewald had advised the Mall staff to spray all areas that needed spraying, not just the ones that were indicated on his order.<sup>631</sup>

Mr. Nazarian had instructed Ms. Laroue that only the four specified areas should be sprayed and that she was not to let the City inspect the other areas.<sup>632</sup> Mr. Fabris testified that he told Ms. Laroue that the order required that all areas in need of fireproofing be addressed, and not just the four specific ones.<sup>633</sup>

Ms. Laroue had explained to Mr. Nazarian that the fireproofing was a safety issue. She described Mr. Nazarian’s lack of co-operation with the Fire Department as follows:

- Q. And how so? Or was that what you were referring to earlier about not letting them on the property?
- A. Don’t let them on the property. Don’t answer it. Don’t do the work. Just put it aside. Wait until they come back again. Yes, those were instructions commonly received.
- Q. And did you get those instructions or were they part of your instructions as far as the fireproofing issue was concerned that we talked about just earlier this afternoon.
- A. For fireproofing, for repairing the fire protection system in the hotel, also any time that they came and did inspections as far as anything from fire hydrants to lights not working to the exit signs not being lit, it was never something that was promptly dealt with. It was always drag our heels until the last possible minute.<sup>634</sup>

Ms. Laroue further testified that, according to Mr. Nazarian, this issue was not about safety, but dollars.<sup>635</sup> This pithy statement, in my view, reveals a great deal about Mr. Nazarian’s priorities.

Mr. Ewald’s concern about the fireproofing was reiterated in a letter to Mr. Fabris on December 3, 2009, in which he stated:

Please note however that the areas identified in the Order dated September 25, 2009 were examples only and not intended to be construed as the only areas requiring work, the scope of work was to be determined by the structural engineer hired by the mall.<sup>636</sup>

Mr. Ewald testified that this letter dealt only with the fireproofing issue.<sup>637</sup> It was not meant to address the repairs to stop the leaks. After all, Mr. Ewald had already concluded that what the owner “had been doing with regards to the caulking was working” and that the leaks had stopped.

On December 16, 2009, Chief Officer's inspection of the Mall revealed that the four specified areas, but nothing more, had been dealt with. It was pointed out, once again, that it was the owner's responsibility to inspect the Mall fully and to replace any missing fireproofing as required by the *Fire Code*.<sup>638</sup> The reason the order had not been fully complied with, according to Ms. Laroue, was Mr. Nazarian's refusal to pay for it.<sup>639</sup>

Finally, following a subsequent re-inspection on February 1, 2010, Chief Officer was satisfied that the fireproofing was in compliance with the *Fire Code*.<sup>640</sup>

This issue had been simmering since the fall of 2006. Chief Officer's lack of diligence, coupled with Mr. Nazarian's *modus operandi* of dollars before safety, allowed it to drag on for an inexcusable duration.

## **October–November: Despite the City having concerns over the structure of the Mall, the Library is forced to remain in it**

### **The Library wants to be independent from the City**

On October 15, 2009, Mr. Bauthus attended a meeting of the Library board, where Peter Cavanagh, a lawyer retained by the Library, was also present. Mr. Bauthus's notes of the meeting indicate:

Peter Cavanagh, lawyer to appear.

Question re incorporation of libraries.

Follow-up re additional space at other libraries.

How many libraries are incorporated as a not for profit corporation?

Determine how many manage their own leases, accountings, etc.

Contact Teresa Cassan re library board – financial mgmt.

Pull library stats re bank account.<sup>641</sup>

Mr. Bauthus testified that this meeting was held because the Library was interested in incorporating itself as a not-for-profit corporation, separate from the City. The board wanted to run its own financial and operational management.<sup>642</sup> Mr. Bauthus testified that the City tried to explain to the board that, pursuant to the *Public Libraries Act*, the board was already incorporated and the City supported it financially. He also explained to it that although larger boards had incorporated as not-for-profit corporations, the process would be quite costly for the board to undertake on its own.<sup>643</sup>

The Library wanted to become independent of the City because it wanted to leave the Mall and it did not like the City getting involved in its affairs. The City had been carrying on the negotiations for the lease entirely outside the control of the Library.<sup>644</sup>

### **Councillors Soulière and Reinhardt unilaterally schedule a special meeting of the Library board to try to convince it to sign the lease**

On October 27, 2009, Councillors Soulière and Reinhardt sent a letter to Ms. Croxson, as well as the other members of the Library board, requesting a special meeting of the board on November 4, 2009. They wanted to meet with Ms. MacLean to discuss and explain the issues relating to the constitution of the board pursuant to the *Public Libraries Act*, liability coverage for members of the board related to the operations of the Library, and the outstanding issues on the lease for the space in the Mall.<sup>645</sup>



The meeting with the Library board took place on November 4, 2009, with Ms. MacLean, insurance broker Rick Fournier, and Mr. Bauthus also present. Ms. MacLean advised the board that the Library was a corporation under the *Public Libraries Act* and had all the attributes of a corporation – that it was a person at law, and that the individual members of the board did not incur personal liability for the actions of the board. Mr. Fournier informed the board that all its members were covered under the City's insurance policy.<sup>646</sup> Despite the information provided, the board was not satisfied and did not sign the lease at the end of this meeting.<sup>647</sup>

## **Contrary to the City solicitor's advice, Mr. Bauthus recommends to City Council that it execute the lease**

On November 5, 2009, Mr. Bauthus sent a report to council recommending that the City enter into a lease agreement with Eastwood and then provide the space to the Library for it to occupy. In his report, under the heading "Analysis," Mr. Bauthus stated:

The authority for the Library Board to execute a lease for premises to be used for the library is under the Public Libraries Act and the appropriate course of action would be to have the Board execute the lease knowing that the financial aspects have been reviewed and agreed to by City Council in the recommendation made August 24, 2009. For various reasons known to the Library Board members, the lease has not been executed. It would be prudent for us to do something before we lose the opportunity of capturing some of [the] benefits agreed to in the lease.

The Municipality under the Municipal Act has the authority to enter into the lease. In this respect the Municipality can execute the lease that allows the library to operate out of the space so leased for the term of the lease.<sup>648</sup>

Mr. Bauthus concluded his memo by indicating that if council executed the lease, the City would be able to complete the outstanding issues respecting the Library and could direct its attention to the more pressing operational concerns related to the Library and the City.<sup>649</sup> Mr. Bauthus recognized that the advice he was now giving council was contrary to the opinion of Ms. MacLean, who had confirmed that the board had to sign the lease.<sup>650</sup> He testified that, after the legal opinion was received, he spoke with Ms. MacLean, who indicated that there was a grey area concerning the City's authority to execute a lease.<sup>651</sup> Ms. MacLean did not put this advice in writing. Mr. Bauthus admitted that he did not ask the Library whether it wanted to operate out of the Mall. He simply told the Library that the City had executed the lease, and it was to operate out of that space.<sup>652</sup>

Mr. Collett testified that he did not agree with Mr. Bauthus; however, by that time, the Library board was more or less defeated and it did not matter what it had to say or whether it opposed the lease. The City was going ahead and executing the lease regardless of its concerns. Mr. Collett testified that he did not believe the lease was beneficial to the Library board.<sup>653</sup>

Mayor Hamilton testified that he did not question the advice of Mr. Bauthus, despite the fact that it was contrary to the opinion of the City's solicitor. He was asked if, before deciding that the City should sign the lease, he had given any consideration to whether the Library might have been right about wanting to get out of the Mall, given the issues about the leaks and the potential structural damage that had been uncovered over the previous six weeks. He testified that the Library board and staff were certainly concerned about the leaks – that was their primary reason for wanting to move out – but his concern was that he did not want the Library to move out until the multiplex was ready. Mayor Hamilton testified that the events which had transpired between August 2009 (when council recommended that the Library sign the lease) and November 5, 2009 (including the City officials' meeting of September 24, Mr. Ewald's inspection, the Order to Remedy, and the concerns expressed by Chief Officer in his email of October 28) did not cause him to revisit the issue and conclude that the Library might be right in wanting to move out.<sup>654</sup>

## City Council executes the lease on behalf of the Library, despite the Library's protest

On November 9, 2009, a meeting of the City Council addressed the Library's lease. By a majority of five to two, council received the report of Mr. Bauthus dated November 5, 2009, passed a resolution to enter into a lease agreement with Eastwood for the Library, and passed a resolution to enact a by-law authorizing the lease agreement. Councillors Collett and Patrie voted against the resolutions.<sup>655</sup>

Mr. Collett testified that he voted against the two resolutions because of the concerns he had about the lease – including the fact that there was no guarantee that the owner would be responsible for damages in case of leaks, and that there was no opportunity for the Library to get out of the lease in case of leaks. Mr. Collett testified that, when the Library board learned of the resolutions, the reaction of the members was one of defeat and disappointment.<sup>656</sup> Very few options were available for the Library, given that its funding was approved by City Council. Yet the leaks continued in the Library until the time of the collapse.

Mayor Hamilton voted in favour of the lease. He gave the following evidence about the water-infiltration clause (referred to below as the "escape clause") during cross-examination by Chuck Myles, a representative of the Seniors' Action Group of Elliot Lake (SAGE):

Q. My question to you is what authority did City Council have to negotiate conditions of the Property Standards By-Law? You are telling this owner that he doesn't have to fix the roof, and if it continues to leak, you are going to move out. But you are not telling him to fix the roof. You are telling him if he doesn't fix it, so you are giving him permission not to fix the roof. What authority do you have to negotiate that by-law in that way which says that the building is to be watertight?

A. Well, first of all, sir, we are not negotiating a by-law with the property owner. By-laws are addressed and approved by Council, not with a private property owner.

Q. But isn't this escape clause in effect telling him he doesn't have to pay attention to that by-law?

A. Absolutely not, sir.

Q. I interpret it that it would ... you have given him permission not to seal that roof and make it watertight. You are telling him that you will move out if he doesn't ... fix the leaks, which means he can go ahead and do what he has been doing for 18 years but the leaks never get fixed; is that correct?

A. That is your view, sir, yeah.

Q. Isn't that contrary to what the by-law says?

A. No. The by-law is still in place.

Q. But you are not enforcing it and you are not telling him he has to make it watertight?

A. We were enforcing it. As you see, there was orders [sic] issued.

Q. I'm talking about negotiating this lease with that clause in there, which I am sure he could get legal advice to argue that point that you are giving him permission he does not have to seal it and make it watertight; he can continue with the maintenance that he is doing to fix the leaks now and it is going to leak another month from now when it rains.

A. I'm not sure what legal advice you speak to, but –

Q. Well, an argument, you could make that argument? That is what you are doing. You are telling him you don't have to seal this building. You are to fix the leaks. They have been fixing leaks for 18 years and it never stopped the leaks, never made that building watertight. And you are giving him an out, which he took, by the way. He didn't have to fix the leaks, and he never did. And that was my point.

THE COMMISSIONER: But ... do you have a question, Mr. Myles? ...

BY MR. MYLES:

Q. Well, my question was, what authority does the City have to give him that right that he doesn't have to make that building watertight?

A. We have no authority to do that.

Q. How is it that the people on Council who know about that building by-law could put this through without questioning the by-law and the enforcement of the by-law?

A. You would have to ask the Councillors that.

Q. Well, you are the head of the Council, and I am asking you.

A. Well, you asked my opinion, yeah, but you asked me how could Councillors do that. That is what I understood your question to be, sir.

Q. I have one more question for you, sir. Would ... it help Council if the Building Official sat in the Council meetings and would be present when some of these things were discussed so he could bring his expertise to bear on matters dealing with by-laws such as the Property Standards By-Law?

A. Well, what I can say to you is if a by-law revision such as property standards came to Council and when it did come to Council, the Chief Building Official was present and was available to answer questions. So that is a regular course of business at City Council and has been for the entire period of time I have been on Council. So I think that answers your question.

Q. You don't think his presence there when you are negotiating this lease would have made a difference?

A. Okay, that is not what I understood your question to be. What, have the Chief Building Official as part of the negotiations? Our Chief –

Q. No, attend Council meetings, like the Fire Chief does.

A. Okay, that is what I just answered, sir. He does attend Council meetings when matters relevant to his department or to his job duties are before Council. That is a regular practice of Council.<sup>657</sup>

I agree with SAGE that, by executing the lease, the City was effectively endorsing the conduct of Eastwood, which was clearly in violation of the Property Standards By-law. In fact, the City had recognized that very violation by issuing its Order to Remedy less than two months earlier.

### **Mayor Hamilton loses interest in the leaks after the Library lease is signed; he views his job as being done**

Mayor Hamilton testified that after the Library lease was signed in November 2009, he did not inquire into the situation or ask what was going on with the leaks at the Mall or at the Library.<sup>658</sup> After all, Mayor Hamilton and the majority of council had achieved what they had intended to do: force the Library to stay in the Mall, and thereby impose their mindset about the economic stability of the Mall and the City.

### **November: Despite what Mr. Ewald thought, the leaks were not fixed**

On November 26, 2009, Mr. Davison of the Royal Bank emailed David Miller, a property inspector, asking him to conduct an inspection of the Mall to determine whether, as Bob Nazarian had advised him, the leaks had been corrected and all ceiling tiles had been replaced as the result of the \$800,000 that Eastwood had spent.<sup>659</sup> When asked whether he had spent this amount to fix the leaks by November 2009, Mr. Nazarian answered with his usual cryptic "possible." He could not recall informing Mr. Davison of that amount or that the leaks had been fixed. He agreed that the leaks were not corrected by November 2009.<sup>660</sup>



There is no evidence that Bob Nazarian actually spent \$800,000 to fix the leaks in the entire period he owned the Mall. Here was yet another attempt by Bob Nazarian to mislead the bank into thinking that he had corrected the deficiencies it had noted in its previous annual inspection.

### **October–December: Eastwood continues to try to sell the Mall**

On October 29, 2009, Eastwood received an offer to purchase from Iftikhar Hossain for \$10.2 million, with a \$50,000 deposit. Schedule A stipulated that there would be a land swap for a \$3 million property and the payment of a further \$6.05 million.<sup>661</sup>

Levon Nazarian testified that the parties went back and forth on the price.<sup>662</sup> On December 2, 2009, Eastwood's solicitor prepared an unsigned agreement of purchase and sale between Eastwood and Mr. Hossain for the price of \$9.4 million, including a partial land swap. This agreement was a further iteration of the October 29, 2009, offer from Mr. Hossain.<sup>663</sup>

Bob Nazarian testified that the agreement with Mr. Hossain did not close. In an email from Mr. Hossain's solicitor to Eastwood's solicitor dated December 10, 2009, it appears that Mr. Hossain was not content with the financial disclosure of the Mall. Nonetheless, Bob Nazarian testified that the deal did not close because Mr. Hossain was not able to arrange for his own financing and not because he was unhappy with the financial information provided.<sup>664</sup>

### **November–December: Land purchase – Bob Nazarian is in “no hurry” to buy the land, despite the structural concerns about the Mall**

#### **Bob Nazarian offers to buy the City land for \$15,000**

On November 18, 2009, Mr. Fabris wrote to Mr. Bauthus with a counter-offer of \$15,000 for the municipal land sought to be purchased by Bob Nazarian, a price far below the appraised value. Mr. Nazarian testified he would have paid the \$55,000 market value if he had to, but he never made that offer. He would later increase his offer only to \$20,000. Mr. Nazarian was clearly in no hurry to buy the land, close the parking on the roof, and permanently stop the leaks.<sup>665</sup>

Despite the price being below the appraised value, the same day Mr. Bauthus wrote Mr. Fabris, advising him that the City was in receipt of his client's request and that it would be forwarded to the Planning and By-law Committee to be reviewed at its next meeting, on December 7, 2009.<sup>666</sup>

#### **City Council is advised by Ms. Sprague that the Mall is “facing serious structural problems;” nothing is done about them**

On November 30, 2009, Ms. Sprague sent a report to members of council, updating them on the issue of the parcel of land. She advised councillors that the land had been declared surplus by the City and appraised at \$55,000 to \$60,000; that a draft agreement of purchase and sale had been forwarded to counsel for Bob Nazarian and that it included, among other things, a condition that the purchaser commence construction on the property within 24 months and complete it within six months thereafter; and that Mr. Nazarian had offered \$15,000 for the property (approximately one-quarter of the appraised value). She also wrote:

The creation of this additional parking area is required in order to create an alternative parking area. The Mall building is currently *facing serious structural problems* associated with leakage from the rooftop parking area.<sup>667</sup> [Emphasis added.]

When asked where or from whom she obtained the information that the building was facing serious structural problems, Ms. Sprague testified:

Those are my own words describing all the information we had been provided to up to that point by Mr. Fabris on behalf of his client. They wanted to remove parking or reduce weight and traffic on the roof, and those are just my own words to say obviously they are looking to remove the parking from the roof ...

I'm not qualified to make any judgments about the structural integrity, but I mean, the leaking roof to me is a – it is a structure and it is a serious problem because it has been leaking. It is not – to not read anything more into it than that ...

Well, the roof is a structure. A roof is a structure, I know this. But I'm not qualified to make any judgments about how good the structure is.<sup>668</sup>

...

Because I didn't look at it as a serious structural problem. I didn't realize the meaning of those words. It is an unfortunate choice of words in hindsight. Those words were not – I didn't bring that to the attention of the committee.<sup>669</sup>

Ms. Sprague testified that she meant the additional land would assist the owner with its continuing maintenance of the roof, which was seen by her as a serious issue. She testified that she did not have any actual factual information about the matter – that her statement was based just on what she had read in Mr. Fabris's letters and was not taken from any engineering report. She testified that the chief building official did not suggest those words to her.<sup>670</sup>

Mr. Bauthus testified that he did not take any action when he read Ms. Sprague's statement about the structural problems because the engineer's report had already stated that there were no structural issues. He did not ask Ms. Sprague where she had received this information, and he did not speak to Mr. Ewald about her report.<sup>671</sup>

When asked what he thought about Ms. Sprague's statement that the Mall was facing serious structural problems associated with the leakage, Mr. Collett testified that he was wondering about the source of her information and whether it was true. He did not, however, ask those questions of Ms. Sprague. Nor did he give a copy of the report to Mr. Ewald so he could inquire about the structural problems of the Mall. He assumed Mr. Ewald was aware of this report, given his role as secretary of the By-law and Planning Committee.<sup>672</sup>

Mayor Hamilton testified that, although he read Ms. Sprague's report, he did not recall reading the particular sentence about the structural problems, which appeared under the "Links to the Strategic Plan" heading. He agreed that the statement was fairly serious, especially since it was made after council had received a report from Chief Officer advising that the City had received the report from M.R. Wright, which said there were no structural concerns. Mayor Hamilton testified that, as far as he was aware, nobody discussed this particular sentence at any meetings.<sup>673</sup>

Mr. Ewald testified that Ms. Sprague's mention of "serious structural problems" did not give rise to a concern on his part because Bob Nazarian had already made such a remark at a meeting with Mr. Bauthus, Ms. Sprague, and Mr. Fabris, and because he believed Mr. Nazarian was simply making that comment to prompt the City to sell him the property at a reduced price. Mr. Ewald testified that that meeting would have taken place in the month before Ms. Sprague's report. He is not sure whether he had Mr. Wood's report when this issue was raised at the meeting with Mr. Nazarian. He testified that, if he did not have the report at the meeting, Mr. Nazarian's comment would not have caused him greater concern because he would have been waiting for Mr. Wood's report. On the other hand, if he did have the report at the meeting, he would not have been concerned because Mr. Nazarian said such things to get what he wanted. Mr. Ewald testified that he did not read these reports (Mr. Wood's and

Ms. Sprague's) in depth, but he also stated that he read this statement (that the Mall "was facing serious structural problems") at the meeting. When pressed, Mr. Ewald admitted that he did not believe that the statement by Ms. Sprague was true, but he did not speak to anyone about it.<sup>674</sup> I don't think I am being too cynical when I say that it seems as though few things Mr. Ewald learned about the Mall ever gave him any concern.

Bob Nazarian denied that Ms. Sprague's information came from a conversation he had with Mr. Ewald. He "hardly talked with Mr. Ewald," he explained. The only time they spoke was about the building permit issue with Mr. Clinckett in July 2008. He did not recall meeting him any other time.<sup>675</sup>

Although I agree with Mr. Ewald that Bob Nazarian wanted to acquire the land at the lowest possible price and was trying to convince the City to accept his offer, I am not persuaded by his evidence that the information in Ms. Sprague's report came from a meeting that took place with Mr. Nazarian. Ms. Sprague repeatedly testified that the information was simply an unfortunate use of words on her part and did not suggest that it came from Mr. Nazarian. If that had been the case, I believe she would have said so during her testimony.

I am unable to reach a conclusion about the source of the statement.

What is clear, however, is that the mayor, all councillors, Mr. Bauthus, and Mr. Ewald were told by Ms. Sprague, in writing, that the Mall was facing serious structural problems associated with leakage from the rooftop parking area. The glaring reality is that it was true. And nothing was done about it, even though Mr. Ewald's order, requiring an inspection of the entire Mall by a structural engineer, had been made just two months beforehand the resulting report had not indicated that such an inspection had been carried out. I was given no explanation for this state of affairs. It is incomprehensible. Did anyone care whether there were, in fact, structural problems at the Mall? It seems that no one did.

### **The City is not prepared to sell the land below fair market value**

On December 7, 2009, the By-law and Planning Committee met and discussed the most recent offer to purchase the land from Eastwood. The offer was rejected.

Ms. Sprague testified that the committee did not discuss the note in her report about the Mall's serious structural problems, and neither did she bring that part of her report to the attention of the committee. It was not regarded as a major issue, given that everybody knew about the leaking roof and why Eastwood wanted to purchase the land. Ms. Sprague testified that she did not believe it was explained to the committee that the reasons the owner wanted to buy the property were (1) to reduce the weight; (2) to alleviate the leaks; and (3) to get alternative parking.<sup>676</sup>

The next day Ms. Sprague sent a letter to Mr. Fabris, advising him that the By-law and Planning Committee had considered Eastwood's offer.<sup>677</sup> Ms. Sprague then went on to state that in June the City had provided a draft agreement of purchase and sale at a price of \$55,000, the low end of the appraised value. She then referred to section 106 of the *Municipal Act*, which provides that a municipality shall not grant assistance by leasing or selling any property at below fair market value. She advised Mr. Fabris that the committee would consider a reasonable offer, provided the value was not so drastically discounted and more accurately reflected the fair market value.<sup>678</sup>

Bob Nazarian testified that he left the negotiations to Mr. Fabris and that it was not just the price that was objectionable. He also objected to some conditions. He was not in a rush to purchase. He testified that if he had funds available, he would have bought the land immediately, regardless of the price.<sup>679</sup>



Despite that statement, I do not believe that Bob Nazarian was prepared to purchase the municipal land at market value. He claimed he was not happy with the “conditions” imposed by the City. As far as I can discern, Mr. Nazarian was hoping to be able to close the roof to parking, buy the land, and take his time transforming it into a parking lot. The City’s wish to get assurances from Mr. Nazarian that he would use the land to create a new parking lot within a reasonable period was understandable.

### **Scotiabank did not have three consecutive weeks without leaks in 2009**

On September 16, 2009, Mr. Fabris sent a letter to Scotiabank advising that no mould had been found in the vicinity of the bank.<sup>680</sup> On October 6, 2009, Mr. Fabris sent another letter to Scotiabank, in which he proposed an action plan where Eastwood would fix the damaged drywall and the ceiling and replace the carpet damaged from leakage. He further wrote that it had rained for the past week and a half, and there were no discernible leaks or moisture in the bank. Ms. McCulloch, the bank’s customer service manager, testified that she did not have any recollection of the bank ever being leak-free when it rained.<sup>681</sup>

In a letter to Mr. Fabris on October 9, 2009, Scotiabank reiterated that it needed three weeks during rainy season without leaks before it would allow any work to be done at the branch.<sup>682</sup> Ms. McCulloch testified that, as of October 2009, there had not been three weeks without rain.<sup>683</sup>

Despite the bank’s clear opposition, contractors came into the branch, advising staff that construction would begin. On October 13, 2009, Scotiabank advised Bob Nazarian again that no work could begin until the three-week condition was met.<sup>684</sup>

On October 21, 2009, Mall staff requested that branch staff sign a form confirming there had been no leaks for three weeks, despite the fact that it was not true.<sup>685</sup> On October 26, 2009, Mr. Fabris advised Scotiabank that Eastwood had retained M.R. Wright to conduct mould testing.<sup>686</sup> Although torrential downpours had occurred in October, that same day Mr. Fabris sent a second letter to Scotiabank, stating that there had been four weeks without leaks. He also stated that the owner would forgive the unpaid rent and that the repairs performed by Scotiabank “were done without cause” because they were carried out before the completion of the roof repairs.<sup>687</sup>

I find this statement difficult to fathom. Scotiabank had received numerous reports from Pinchin confirming the presence of mould and the necessity to remove it expeditiously. Bob Nazarian had not fixed the roof. An email sent to Bob Nazarian by Scotiabank on the same day as Mr. Fabris’s letter shows that leaks continued to occur. The email advised of leaks in the storage room, the rear entrance, and the electrical room.<sup>688</sup>

In November 2009, Scotiabank began to consider the possibility of relocating the branch “due to the ongoing problems with water penetrating into the branch.”<sup>689</sup>

On December 9, 2009, Bob and Irene Nazarian sent an email to Scotiabank claiming that they had “completed the roof repair.”<sup>690</sup> This claim was patently untrue. Eastwood had not been doing anything other than what it had done since purchasing the Mall – re-caulking the roof. The leaks at Scotiabank would never stop until the branch moved out in December 2011.

## Notes

- <sup>1</sup> Sprague testimony, July 12, 2013, pp. 16066–7; Exhibit 1039; Hamilton testimony, July 9, 2013, p. 15168.
- <sup>2</sup> Exhibit 313.
- <sup>3</sup> Bob Nazarian testimony, July 23, 2013, pp. 18215–17.
- <sup>4</sup> Collett testimony, May 23, 2013, pp. 11161–3.
- <sup>5</sup> Collett testimony, May 23, 2013, pp. 11161–4.
- <sup>6</sup> Sprague testimony, July 12, 2013, pp. 16067–9; Exhibit 313.
- <sup>7</sup> Exhibit 13-25.
- <sup>8</sup> Exhibit 13-25.
- <sup>9</sup> McCulloch testimony, June 13, 2013, p. 14448.
- <sup>10</sup> Exhibit 13-25, p. 041; McCulloch testimony, June 13, 2013, p. 14448.
- <sup>11</sup> Exhibit 1327 or 13-26; see also McCulloch testimony, June 13, 2013, pp. 14449–50.
- <sup>12</sup> Bob Nazarian testimony, July 25, 2013, pp. 18217–21.
- <sup>13</sup> Bob Nazarian testimony, July 25, 2013, pp. 18217–21; Exhibit 1327.
- <sup>14</sup> McCulloch testimony, June 13, 2013, p. 14449.
- <sup>15</sup> Exhibit 13-129.
- <sup>16</sup> Exhibit 13-129; McCulloch testimony, June 13, 2013, p. 14451.
- <sup>17</sup> Exhibit 13-27.
- <sup>18</sup> McCulloch testimony, June 13, 2013, pp. 14452–3.
- <sup>19</sup> McCulloch testimony, June 13, 2013, pp. 14453–4.
- <sup>20</sup> Cuthbertson testimony, May 1, 2013, pp. 7878–9; Exhibit 12-75.
- <sup>21</sup> Fabris testimony, July 11, 2013, pp. 15740–1.
- <sup>22</sup> Exhibit 3460; Bauthus testimony, May 16, 2013, pp. 10360–3; Fabris testimony, July 11, 2013, p. 15741.
- <sup>23</sup> Exhibit 11-182; Bauthus testimony, May 16, 2013, p. 10363.
- <sup>24</sup> Hamilton testimony, July 9, 2013, pp. 15171–3.
- <sup>25</sup> Exhibit 3461.
- <sup>26</sup> Bauthus testimony, May 16, 2013, pp. 10363–4.
- <sup>27</sup> Bauthus testimony, May 16, 2013, pp. 10364–5.
- <sup>28</sup> Bauthus testimony, May 16, 2013, pp. 10365–7.
- <sup>29</sup> Bauthus testimony, May 16, 2013, p. 10366.
- <sup>30</sup> Exhibit 346.
- <sup>31</sup> Exhibit 261 (same as Exhibit 127).
- <sup>32</sup> Exhibit 261.
- <sup>33</sup> Bauthus testimony, May 16, 2013, p. 10370.
- <sup>34</sup> Exhibit 1330.
- <sup>35</sup> Bauthus testimony, May 16, 2013, p. 10371.
- <sup>36</sup> Bauthus testimony, May 16, 2013, p. 10378–9.
- <sup>37</sup> Collett testimony, May 23, 2013, pp. 11166–7; Exhibit 261.
- <sup>38</sup> Hamilton testimony, July 9, 2013, pp. 15169–71; Exhibit 261.
- <sup>39</sup> Sprague testimony, July 12, 2013, pp. 16070–2; Exhibit 261.
- <sup>40</sup> Sprague testimony, July 12, 2013, p. 16072.
- <sup>41</sup> Ewald testimony, May 24, 2013, p. 11533.
- <sup>42</sup> Ewald testimony, May 24, 2013, p. 11534.
- <sup>43</sup> Ewald testimony, May 24, 2013, pp. 11535–7.
- <sup>44</sup> Ewald testimony, May 24, 2013, pp. 11537–8.
- <sup>45</sup> Ewald testimony, May 24, 2013, pp. 11538–9.
- <sup>46</sup> Exhibit 339; see also Sprague testimony, July 12, 2013, p. 16072.
- <sup>47</sup> Exhibit 3462.
- <sup>48</sup> Bauthus testimony, May 16, 2013, p. 10386.
- <sup>49</sup> Bauthus testimony, May 16, 2013, p. 10387.
- <sup>50</sup> Exhibit 11-183.
- <sup>51</sup> Bauthus testimony, May 16, 2013, pp. 10389–90; Exhibit 11-183, p. 3.
- <sup>52</sup> Collett testimony, May 23, 2013, pp. 11167–71.
- <sup>53</sup> Exhibit 312.
- <sup>54</sup> Sprague testimony, July 12, 2013, pp. 16073–5; Exhibit 312.
- <sup>55</sup> Bauthus testimony, May 16, 2013, pp. 10382–3.
- <sup>56</sup> Bauthus testimony, May 16, 2013, pp. 10383–5.
- <sup>57</sup> Exhibits 3465, 165.
- <sup>58</sup> Exhibit 165.
- <sup>59</sup> Exhibit 3465; Bauthus testimony, May 21, 2013, p. 10401.
- <sup>60</sup> Bauthus testimony, May 21, 2013, p. 10398.
- <sup>61</sup> Bauthus testimony, May 21, 2013, pp. 10398–401.
- <sup>62</sup> Sprague testimony, July 12, 2013, pp. 16075–6.
- <sup>63</sup> Collett testimony, May 23, 2013, p. 11174; Exhibits 165, 3465.
- <sup>64</sup> Hamilton testimony, July 9, 2013, pp. 15176–7; Exhibits 165, 3465.
- <sup>65</sup> Collett testimony, May 23, 2013, pp. 11173–5; Hamilton testimony, July 9, 2013, pp. 15177–8; Exhibits 165, 3465.
- <sup>66</sup> Exhibit 1037.
- <sup>67</sup> Exhibit 264.
- <sup>68</sup> Sprague testimony, July 12, 2013, pp. 16076–7.
- <sup>69</sup> Sprague testimony, July 12, 2013, p. 16077; Exhibit 265.
- <sup>70</sup> Exhibits 4450, 4451.
- <sup>71</sup> Laroue testimony, May 22, 2013, p. 10800.
- <sup>72</sup> Laroue testimony, May 22, 2013, p. 10807.
- <sup>73</sup> Laroue testimony, May 22, 2013, p. 10804.
- <sup>74</sup> Laroue testimony, May 23, 2013, pp. 10970–2.
- <sup>75</sup> Laroue testimony, May 22, 2013, p. 10801.
- <sup>76</sup> Laroue testimony, May 22, 2013, pp. 10801–2.
- <sup>77</sup> Laroue testimony, May 22, 2013, pp. 10808–10.
- <sup>78</sup> Laroue testimony, May 22, 2013, pp. 10813–15.
- <sup>79</sup> Laroue testimony, May 22, 2013, pp. 10886–9.
- <sup>80</sup> Laroue testimony, May 22, 2013, pp. 10889–95.
- <sup>81</sup> Laroue testimony, May 22, 2013, pp. 10803–4.
- <sup>82</sup> Exhibit 4452.
- <sup>83</sup> Laroue testimony, May 22, 2013, pp. 10806–8.
- <sup>84</sup> Bob Nazarian testimony, July 25, 2013, pp. 18229–31.
- <sup>85</sup> Exhibit 4454.
- <sup>86</sup> Bob Nazarian testimony, July 26, 2013, pp. 18582–4.
- <sup>87</sup> Exhibits 4453, 4454.
- <sup>88</sup> Bob Nazarian testimony, July 26, 2013, pp. 18579–81; Exhibit 4453.
- <sup>89</sup> Exhibit 1474.
- <sup>90</sup> Bob Nazarian testimony, July 26, 2013, pp. 18584–6; Exhibit 1474.
- <sup>91</sup> Exhibit 1474.
- <sup>92</sup> Bauthus testimony, May 21, 2013, pp. 10404–6.
- <sup>93</sup> Fabris testimony, July 11, 2013, p. 15743.
- <sup>94</sup> Exhibit 1474.
- <sup>95</sup> Fabris testimony, July 11, 2013, p. 15744.
- <sup>96</sup> Exhibit 13-135; McCulloch testimony, June 13, 2013, p. 14458.
- <sup>97</sup> Exhibit 13-29 (same as 5434); McCulloch testimony, June 13, 2013, pp. 14456–7.
- <sup>98</sup> Exhibit 5146.
- <sup>99</sup> Exhibit 13-29; McCulloch testimony, June 13, 2013, pp. 14457–9.
- <sup>100</sup> McCulloch testimony, June 13, 2013, p. 14459.
- <sup>101</sup> McCulloch testimony, June 13, 2013, p. 14461; Exhibit 5146.
- <sup>102</sup> McCulloch testimony, June 13, 2013, p. 14462.
- <sup>103</sup> Bob Nazarian testimony, July 25, 2013, pp. 18231–3.
- <sup>104</sup> Bob Nazarian testimony, July 25, 2013, p. 18233.
- <sup>105</sup> Bob Nazarian testimony, July 25, 2013, pp. 18233–6.
- <sup>106</sup> Exhibit 1036.
- <sup>107</sup> Hamilton testimony, July 9, 2013, pp. 15178–9; see, however, footnote 1805 in Chapter 6.

- <sup>108</sup> Sprague testimony, July 12, 2013, p. 16077.
- <sup>109</sup> Wood testimony, June 6, 2013, pp. 13268–72; Exhibits 5217, 5216.
- <sup>110</sup> Wood testimony, June 6, 2013, pp. 13241–4.
- <sup>111</sup> Wood testimony, June 7, 2013, pp. 13406–12.
- <sup>112</sup> Wood testimony, June 6, 2013, pp. 13245–6.
- <sup>113</sup> Wood testimony, June 6, 2013, p. 13245.
- <sup>114</sup> Exhibit 5219.
- <sup>115</sup> Wood testimony, June 6, 2013, pp. 13270–2; Exhibits 5217, 5219.
- <sup>116</sup> Wood testimony, June 6, 2013, p. 13275.
- <sup>117</sup> Wood testimony, June 6, 2013, p. 13277, 13280.
- <sup>118</sup> Wood testimony, June 6, 2013, p. 13279; Exhibit 66, p. 035.
- <sup>119</sup> Wood testimony, June 6, 2013, pp. 13279–80; Exhibit 66, p. 035.
- <sup>120</sup> Wood testimony, June 6, 2013, p. 13282.
- <sup>121</sup> Exhibit 5312; Pinchin was approached by the Royal Bank in May 2009 about a proposal but was officially retained on June 1, 2009.
- <sup>122</sup> Hass testimony, June 14, 2013, p. 14553.
- <sup>123</sup> Exhibit 101 (colour copy at Exhibit 105).
- <sup>124</sup> Exhibits 5330, 5307; Hass testimony, June 14, 2013, pp. 14539–41.
- <sup>125</sup> Hass testimony, June 14, 2013, pp. 14519–23.
- <sup>126</sup> Hass testimony, June 14, 2013, pp. 14539–41; Exhibit 5307.
- <sup>127</sup> Hass testimony, June 14, 2013, p. 14542.
- <sup>128</sup> Hass testimony, June 14, 2013, pp. 14598–9.
- <sup>129</sup> Hass testimony, June 14, 2013, pp. 14615–16; Exhibit 5307.
- <sup>130</sup> Exhibit 5307.
- <sup>131</sup> Hass testimony, June 14, 2013, pp. 14543–4; Exhibit 5307.
- <sup>132</sup> Hass testimony, June 14, 2013, pp. 14544–6.
- <sup>133</sup> Hass testimony, June 14, 2013, pp. 14546–8; Exhibit 5308, p. 002.
- <sup>134</sup> Exhibit 5308.
- <sup>135</sup> Hass testimony, June 14, 2013, pp. 14548–50.
- <sup>136</sup> Exhibit 5312.
- <sup>137</sup> Hass testimony, June 14, 2013, pp. 14550–2; Exhibit 5312.
- <sup>138</sup> Hass testimony, June 14, 2013, pp. 14552, 14621–2.
- <sup>139</sup> Exhibit 5310.
- <sup>140</sup> Hass testimony, June 14, 2013, pp. 14553–4.
- <sup>141</sup> Hass testimony, June 14, 2013, p. 14554.
- <sup>142</sup> Hass testimony, June 14, 2013, p. 14564.
- <sup>143</sup> Hass testimony, June 14, 2013, p. 14564.
- <sup>144</sup> Hass testimony, June 14, 2013, pp. 14579–80; Exhibit 101.
- <sup>145</sup> Exhibit 5330, p. 005.
- <sup>146</sup> Hass testimony, June 14, 2013, pp. 14573–4.
- <sup>147</sup> Hass testimony, June 14, 2013, p. 14565, 14571; Exhibit 101, p. 431; Exhibit 105, p. 028.
- <sup>148</sup> Hass testimony, June 14, 2013, p. 14573.
- <sup>149</sup> Exhibit 105, p. 021.
- <sup>150</sup> Hass testimony, June 14, 2013, p. 14576; Exhibit 101.
- <sup>151</sup> Hass testimony, June 14, 2013, p. 14595.
- <sup>152</sup> Exhibit 105, p. 025.
- <sup>153</sup> Hass testimony, June 14, 2013, p. 14577.
- <sup>154</sup> Hass testimony, June 14, 2013, pp. 14577–8.
- <sup>155</sup> Hass testimony, June 14, 2013, p. 14578; Exhibit 105, p. 026.
- <sup>156</sup> Hass testimony, June 14, 2013, pp. 14555, 14559; Exhibit 105, p. 026.
- <sup>157</sup> Hass testimony, June 14, 2013, p. 14582; Exhibit 101.
- <sup>158</sup> Hass testimony, June 14, 2013, pp. 14574–5.
- <sup>159</sup> Hass testimony, June 14, 2013, p. 14707.
- <sup>160</sup> Hass testimony, June 14, 2013, pp. 14707–8.
- <sup>161</sup> Hass testimony, June 14, 2013, p. 14710.
- <sup>162</sup> Exhibit 101.
- <sup>163</sup> Hass testimony, June 14, 2013, p. 14563; Exhibit 101.
- <sup>164</sup> Hass testimony, June 14, 2013, pp. 14583–4; Exhibit 101, p. 405.
- <sup>165</sup> Exhibit 101, pp. 405–6.
- <sup>166</sup> Hass testimony, June 14, 2013, pp. 14585–6.
- <sup>167</sup> Hass testimony, June 14, 2013, p. 14586.
- <sup>168</sup> Hass testimony, June 14, 2013, p. 14624.
- <sup>169</sup> Hass testimony, June 14, 2013, p. 14587; Exhibit 101, p. 406.
- <sup>170</sup> Hass testimony, June 14, 2013, p. 14587.
- <sup>171</sup> Exhibit 101, p. 420.
- <sup>172</sup> Exhibit 101, p. 438.
- <sup>173</sup> Hass testimony, June 14, 2013, pp. 14588–9; Exhibit 101, p. 438.
- <sup>174</sup> Hass testimony, June 14, 2013, pp. 14590–1.
- <sup>175</sup> Hass testimony, June 14, 2013, p. 14591.
- <sup>176</sup> Hass testimony, June 14, 2013, p. 14591.
- <sup>177</sup> Hass testimony, June 14, 2013, pp. 14591–2.
- <sup>178</sup> Hass testimony, June 14, 2013, pp. 14592–4; Exhibit 101, p. 420.
- <sup>179</sup> Hass testimony, June 14, 2013, p. 14594.
- <sup>180</sup> Hass testimony, June 14, 2013, pp. 14595–6.
- <sup>181</sup> Hass testimony, June 14, 2013, p. 14596.
- <sup>182</sup> Hass testimony, June 14, 2013, p. 14597.
- <sup>183</sup> Hass testimony, June 14, 2013, p. 14608; Exhibit 5343, p. 002.
- <sup>184</sup> Hass testimony, June 14, 2013, p. 14627.
- <sup>185</sup> Exhibit 263 (same as Exhibits 1334, 5441).
- <sup>186</sup> Sprague testimony, July 12, 2013, pp. 16077–9.
- <sup>187</sup> Bob Nazarian testimony, July 25, 2013, pp. 18237–9; Exhibit 5441.
- <sup>188</sup> Bob Nazarian testimony, July 25, 2013, pp. 18242–3; July 26, 2013, pp. 18584–6; Exhibit 1474.
- <sup>189</sup> Exhibit 262.
- <sup>190</sup> Exhibit 1468.
- <sup>191</sup> Exhibit 1036.
- <sup>192</sup> Bauthus testimony, May 21, 2013, p. 10408.
- <sup>193</sup> Sprague testimony, July 12, 2013, pp. 16080–2.
- <sup>194</sup> Exhibit 5837.
- <sup>195</sup> Bob Nazarian testimony, July 25, 2013, p. 18245.
- <sup>196</sup> Bob Nazarian testimony, July 25, 2013, pp. 18244–47; Exhibit 5837.
- <sup>197</sup> Fabris testimony, July 11, 2013, pp. 15745–50.
- <sup>198</sup> Bauthus testimony, May 21, 2013, pp. 10413–14.
- <sup>199</sup> Bauthus testimony, May 21, 2013, p. 10414.
- <sup>200</sup> Bauthus testimony, May 21, 2013, p. 10415.
- <sup>201</sup> Fabris testimony, July 11, 2013, pp. 15748–9.
- <sup>202</sup> Exhibit 11-191.
- <sup>203</sup> Bauthus testimony, May 21, 2013, p. 10420.
- <sup>204</sup> Bauthus testimony, May 21, 2013, pp. 10417–18.
- <sup>205</sup> Exhibit 3478.
- <sup>206</sup> Collett testimony, May 23, 2013, pp. 11177–9.
- <sup>207</sup> Collett testimony, May 23, 2013, p. 11179.
- <sup>208</sup> Fabris testimony, July 11, 2013, pp. 15750–2.
- <sup>209</sup> Fabris testimony, July 11, 2013, p. 15753.
- <sup>210</sup> Fabris testimony, July 11, 2013, p. 15753.
- <sup>211</sup> Bob Nazarian testimony, July 25, 2013, p. 18121.
- <sup>212</sup> Exhibit 11-35, p. 4802.
- <sup>213</sup> Exhibit 11-35, p. 4802. Mr. Fabris was not examined about this letter.
- <sup>214</sup> Exhibit 11-36.
- <sup>215</sup> Laroue testimony, May 23, 2013, pp. 11008–9; Exhibit 11-36.
- <sup>216</sup> Bauthus testimony, May 21, 2013, pp. 10420–2.
- <sup>217</sup> Exhibit 11-190.



- <sup>218</sup> Bauthus testimony, May 21, 2013, p. 10424.
- <sup>219</sup> Exhibit 11-190.
- <sup>220</sup> Collett testimony, May 23, 2013, pp. 11179–81.
- <sup>221</sup> Bauthus testimony, May 21, 2013, p. 10428.
- <sup>222</sup> Exhibit 11-190.
- <sup>223</sup> Bauthus testimony, May 21, 2013, pp. 10429–30.
- <sup>224</sup> Bauthus testimony, May 21, 2013, p. 10431.
- <sup>225</sup> Exhibit 11-171.
- <sup>226</sup> Bauthus testimony, May 21, 2013, pp. 10430–3.
- <sup>227</sup> Collett testimony, May 23, 2013, pp. 11179–83.
- <sup>228</sup> Hamilton testimony, July 9, 2013, pp. 15187–92.
- <sup>229</sup> Hamilton testimony, July 9, 2013, pp. 15192–3.
- <sup>230</sup> Exhibit 2353.
- <sup>231</sup> Exhibit 3481.
- <sup>232</sup> Hamilton testimony, July 9, 2013, pp. 15193, 15199–201; Bauthus testimony, May 21, 2013, pp. 10440–1; Collett testimony, May 23, 2013, p. 11186.
- <sup>233</sup> Collett testimony, May 23, 2013, pp. 11183–4.
- <sup>234</sup> Exhibit 2353.
- <sup>235</sup> Bauthus testimony, May 21, 2013, p. 10438.
- <sup>236</sup> Bauthus testimony, May 21, 2013, pp. 10438–9.
- <sup>237</sup> Bauthus testimony, May 21, 2013, p. 10439.
- <sup>238</sup> Exhibit 5843.
- <sup>239</sup> Bauthus testimony, May 21, 2013, p. 10441.
- <sup>240</sup> Bauthus testimony, May 21, 2013, pp. 10441–2.
- <sup>241</sup> Hamilton testimony, July 9, 2013, pp. 15192–9.
- <sup>242</sup> Hamilton testimony, July 9, 2013, pp. 15192–9.
- <sup>243</sup> Hamilton testimony, July 9, 2013, pp. 15192–9.
- <sup>244</sup> Exhibit 11-190
- <sup>245</sup> Exhibit 11-35, p. 4804
- <sup>246</sup> Exhibit 11-198
- <sup>247</sup> Collett testimony, May 23, 2013, pp. 11186–8.
- <sup>248</sup> Exhibit 11-197.
- <sup>249</sup> Bauthus testimony, May 21, 2013, p. 10447.
- <sup>250</sup> Hamilton testimony, July 9, 2013, pp. 15201–5.
- <sup>251</sup> Hamilton testimony, July 9, 2013, pp. 15206–7.
- <sup>252</sup> Exhibit 11-199; see also handwritten notes at Exhibit 3482.
- <sup>253</sup> Bauthus testimony, May 21, 2013, p. 10450.
- <sup>254</sup> Bauthus testimony, May 21, 2013, pp. 10450–1.
- <sup>255</sup> Bauthus testimony, May 21, 2013, p. 10451.
- <sup>256</sup> Bauthus testimony, May 21, 2013, pp. 10452–3.
- <sup>257</sup> Bauthus testimony, May 21, 2013, p. 10453.
- <sup>258</sup> Bauthus testimony, May 21, 2013, pp. 10453–4.
- <sup>259</sup> Bauthus testimony, May 21, 2013, pp. 10459–60
- <sup>260</sup> Bauthus testimony, May 21, 2013, p. 10460.
- <sup>261</sup> Hamilton testimony, July 9, 2013, pp. 15207–12.
- <sup>262</sup> Exhibit 11-35.
- <sup>263</sup> Exhibit 11-35.
- <sup>264</sup> Collett testimony, May 23, 2013, pp. 11188–93; Exhibit 11-35.
- <sup>265</sup> Hamilton testimony, July 9, 2013, pp. 15212–22.
- <sup>266</sup> Bauthus testimony, May 21, 2013, pp. 10467–9.
- <sup>267</sup> Bauthus testimony, May 21, 2013, p. 10470.
- <sup>268</sup> Exhibit 11-201; Hamilton testimony, July 9, 2013, pp. 15227–9.
- <sup>269</sup> Bauthus testimony, May 21, 2013, pp. 10476–7.
- <sup>270</sup> Bauthus testimony, May 21, 2013, pp. 10477–8.
- <sup>271</sup> Collett testimony, May 23, 2013, pp. 11194–5.
- <sup>272</sup> Ewald testimony, May 28, 2013, p. 11910.
- <sup>273</sup> Exhibit 11-201.
- <sup>274</sup> Hamilton testimony, July 9, 2013, pp. 15229–33; Bauthus testimony, May 21, 2013, pp. 10490–2.
- <sup>275</sup> Collett testimony, May 23, 2013, pp. 11195–6.
- <sup>276</sup> Exhibit 11-201.
- <sup>277</sup> Exhibit 3483.
- <sup>278</sup> Hamilton testimony, July 9, 2013, pp. 15226–7.
- <sup>279</sup> Exhibit 11-201.
- <sup>280</sup> Hamilton testimony, July 9, 2013, pp. 15227–35.
- <sup>281</sup> Bauthus testimony, May 21, 2013, pp. 10490–3.
- <sup>282</sup> Collett testimony, May 23, 2013, pp. 11193–7; Exhibit 11-201.
- <sup>283</sup> Exhibits 3484, 11-206.
- <sup>284</sup> Bauthus testimony, May 21, 2013, pp. 10495–6; Exhibit 3484.
- <sup>285</sup> Hamilton testimony, July 9, 2013, pp. 15235–9.
- <sup>286</sup> Exhibit 11-206.
- <sup>287</sup> Hamilton testimony, July 9, 2013, pp. 15235–40.
- <sup>288</sup> Exhibit 11-38.
- <sup>289</sup> Exhibit 11-204.
- <sup>290</sup> Bauthus testimony, May 21, 2013, p. 10503.
- <sup>291</sup> Collett testimony, May 23, 2013, pp. 11197–8.
- <sup>292</sup> Bauthus testimony, May 21, 2013, p. 10499.
- <sup>293</sup> Collett testimony, May 23, 2013, pp. 11198–200.
- <sup>294</sup> Hamilton testimony, July 9, 2013, pp. 15240–2.
- <sup>295</sup> Hamilton testimony, July 9, 2013, pp. 15242–3; Bauthus testimony, May 21, 2013, p. 10502.
- <sup>296</sup> Hamilton testimony, July 9, 2013, pp. 15246–8; Exhibit 11-208.
- <sup>297</sup> Exhibit 11-207.
- <sup>298</sup> Hamilton testimony, July 9, 2013, pp. 15243–6.
- <sup>299</sup> Exhibit 11-209.
- <sup>300</sup> Bauthus testimony, May 21, 2013, pp. 10505–6.
- <sup>301</sup> Collett testimony, May 23, 2013, p. 11200.
- <sup>302</sup> Bauthus testimony, May 21, 2013, pp. 10506–10.
- <sup>303</sup> Exhibit 11-209.
- <sup>304</sup> Exhibit 11-209.
- <sup>305</sup> Collett testimony, May 23, 2013, pp. 11200–4; Hamilton testimony, July 9, 2013, pp. 15248–51.
- <sup>306</sup> Bauthus testimony, May 21, 2013, p. 10516; Exhibit 3490.
- <sup>307</sup> Bauthus testimony, May 21, 2013, pp. 10516–17.
- <sup>308</sup> Collett testimony, May 23, 2013, p. 11204.
- <sup>309</sup> Hamilton testimony, July 9, 2013, pp. 15248–54.
- <sup>310</sup> Exhibit 11-209.
- <sup>311</sup> Bauthus testimony, May 21, 2013, pp. 10514–15.
- <sup>312</sup> Hamilton testimony, July 9, 2013, pp. 15258–63; Exhibit 3751.
- <sup>313</sup> Hamilton testimony, July 9, 2013, pp. 15258–63; Exhibit 3751.
- <sup>314</sup> Bauthus testimony, May 21, 2013, pp. 10515–16.
- <sup>315</sup> Exhibit 11-210.
- <sup>316</sup> Bauthus testimony, May 21, 2013, pp. 10517–20.
- <sup>317</sup> Exhibit 3508, p. 137.
- <sup>318</sup> Collett testimony, May 23, 2013, p. 11205; Bauthus testimony, May 21, 2013, p. 10521.
- <sup>319</sup> Exhibit 13-155.
- <sup>320</sup> Exhibit 13-32 or 5838.
- <sup>321</sup> Exhibit 13-118, p. 005.
- <sup>322</sup> Exhibit 13-160.
- <sup>323</sup> Exhibit 13-162.
- <sup>324</sup> Fabris testimony, July 11, 2013, pp. 15763–4.
- <sup>325</sup> Exhibit 12-53.
- <sup>326</sup> Exhibit 13-177.
- <sup>327</sup> McCulloch testimony, June 13, 2013, pp. 14464–5; Exhibit 13-33.
- <sup>328</sup> McCulloch testimony, June 13, 2013, p. 14465; Exhibit 13-35.
- <sup>329</sup> Exhibit 13-165.

- <sup>330</sup> McCulloch testimony, June 13, 2013, pp. 14465–6.
- <sup>331</sup> Bob Nazarian testimony, July 25, 2013, pp. 18257–8; Exhibit 5445 (see also Exhibit 5447, p. 2449).
- <sup>332</sup> Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- <sup>333</sup> Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- <sup>334</sup> Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- <sup>335</sup> Exhibit 5451.
- <sup>336</sup> Bob Nazarian testimony, July 25, 2013, pp. 18263–5; Levon Nazarian testimony, July 15, 2013, pp. 16357–60.
- <sup>337</sup> Levon Nazarian testimony, July 16, 2013, pp. 16508–17; Exhibit 1085.
- <sup>338</sup> Exhibit 3751.
- <sup>339</sup> Collett testimony, May 23, 2013, pp. 11205–6.
- <sup>340</sup> Bauthus testimony, May 21, 2013, p. 10522.
- <sup>341</sup> Hamilton testimony, July 9, 2013, pp. 15258–9.
- <sup>342</sup> Exhibit 3494; Bauthus testimony, May 21, 2013, pp. 10522–4.
- <sup>343</sup> Bauthus testimony, May 21, 2013, pp. 10524–5.
- <sup>344</sup> Hamilton testimony, July 9, 2013, pp. 15263–6.
- <sup>345</sup> Exhibit 3497.
- <sup>346</sup> Bauthus testimony, May 21, 2013, pp. 10526–7.
- <sup>347</sup> Exhibit 11-41.
- <sup>348</sup> Hamilton testimony, July 9, 2013, pp. 15268–71.
- <sup>349</sup> Bauthus testimony, May 21, 2013, p. 10529.
- <sup>350</sup> Bauthus testimony, May 21, 2013, pp. 10530–1.
- <sup>351</sup> Exhibit 11-41.
- <sup>352</sup> Bauthus testimony, May 21, 2013, pp. 10534–5.
- <sup>353</sup> Hamilton testimony, July 9, 2013, pp. 15268–75.
- <sup>354</sup> Bauthus testimony, May 21, 2013, pp. 10534–5.
- <sup>355</sup> Exhibit 11-41.
- <sup>356</sup> Collett testimony, May 23, 2013, pp. 11208–12.
- <sup>357</sup> Exhibit 302.
- <sup>358</sup> Exhibit 302.
- <sup>359</sup> Officer testimony, April 22, 2013, pp. 6133–6.
- <sup>360</sup> Ewald testimony, May 24, 2013, p. 11540.
- <sup>361</sup> Ewald testimony, May 24, 2013, pp. 11541–2; Exhibit 3750.
- <sup>362</sup> Ewald testimony, May 24, 2013, pp. 11542–3.
- <sup>363</sup> Ewald testimony, May 24, 2013, p. 11451.
- <sup>364</sup> Ewald testimony, May 24, 2012, pp. 11452–3.
- <sup>365</sup> Ewald testimony, May 24, 2013, pp. 11454–5; Exhibit 11-24.
- <sup>366</sup> Bauthus testimony, May 21, 2013, p. 10539.
- <sup>367</sup> Cuthbertson testimony, May 1, 2013, p. 7881.
- <sup>368</sup> Bauthus testimony, May 21, 2013, pp. 10539–40; Exhibit 3503.
- <sup>369</sup> Bauthus testimony, May 21, 2013, pp. 10539–42.
- <sup>370</sup> Exhibit 11-217.
- <sup>371</sup> Exhibit 11-217.
- <sup>372</sup> Collett testimony, May 23, 2013, pp. 11214–21; Exhibit 11-217.
- <sup>373</sup> Exhibit 11-218.
- <sup>374</sup> Bauthus testimony, May 21, 2013, p. 10566.
- <sup>375</sup> Bauthus testimony, May 21, 2013, pp. 10566–7.
- <sup>376</sup> Exhibit 11-218.
- <sup>377</sup> Exhibit 4366.
- <sup>378</sup> Exhibit 11-42.
- <sup>379</sup> Exhibit 11-42.
- <sup>380</sup> Bauthus testimony, May 21, 2013, p. 10573.
- <sup>381</sup> Exhibit 11-42.
- <sup>382</sup> Bauthus testimony, May 21, 2013, pp. 10578–9.
- <sup>383</sup> Collett testimony, May 23, 2013, pp. 11231–5.
- <sup>384</sup> Collett testimony, May 23, 2013, pp. 11235–8.
- <sup>385</sup> Bauthus testimony, May 21, 2013, pp. 10569–70.
- <sup>386</sup> Exhibit 4366, p. 105.
- <sup>387</sup> Exhibit 4366, p. 104.
- <sup>388</sup> Exhibit 4366, p. 104.
- <sup>389</sup> Exhibit 4366, pp. 103–4.
- <sup>390</sup> Exhibit 4366.
- <sup>391</sup> Exhibit 4366.
- <sup>392</sup> Exhibit 3519.
- <sup>393</sup> Bauthus testimony, May 21, 2013, pp. 10593–4.
- <sup>394</sup> Exhibit 3507.
- <sup>395</sup> Ewald testimony, May 24, 2013, p. 11544.
- <sup>396</sup> Ewald testimony, May 24, 2013, pp. 11545–6.
- <sup>397</sup> Ewald testimony, May 24, 2013, p. 11554.
- <sup>398</sup> Ewald testimony, May 24, 2013, pp. 11556–9.
- <sup>399</sup> Ewald testimony, May 24, 2013, pp. 11556–9.
- <sup>400</sup> Ewald testimony, May 24, 2013, pp. 11537, 11555–62.
- <sup>401</sup> Bauthus testimony, May 21, 2013, p. 10545.
- <sup>402</sup> Bauthus testimony, May 21, 2013, pp. 10545–6.
- <sup>403</sup> Hamilton testimony, July 9, 2013, p. 15281–3; Ewald testimony, May 24, 2013, p. 11564.
- <sup>404</sup> Hamilton testimony, July 9, 2013, pp. 15291–2.
- <sup>405</sup> Exhibit 3515.
- <sup>406</sup> Bauthus testimony, May 21, 2013, pp. 10547–9; Hamilton testimony, July 9, 2013, p. 15288.
- <sup>407</sup> Ewald testimony, May 24, 2013, p. 11566.
- <sup>408</sup> Bauthus testimony, May 21, 2013, pp. 10551–2; Ewald testimony, May 24, 2013, pp. 11570–2.
- <sup>409</sup> Ewald testimony, May 24, 2013, p. 11569.
- <sup>410</sup> Ewald testimony, May 24, 2013, p. 11567.
- <sup>411</sup> Ewald testimony, May 24, 2013, pp. 11568–9; see *Building Code Act, 1992*, SO 1992 c 23 as amended by SO 2002, c 9, ss 26, 15.9, 15.10.
- <sup>412</sup> Bauthus testimony, May 21, 2013, pp. 10549–50.
- <sup>413</sup> Hamilton testimony, July 9, 2013, pp. 15281–8.
- <sup>414</sup> Hamilton testimony, July 9, 2013, pp. 15281–8.
- <sup>415</sup> Caughill testimony, May 10, 2013, pp. 9256–7; Exhibit 4112.
- <sup>416</sup> Caughill testimony, May 10, 2013, p. 9265.
- <sup>417</sup> Ewald testimony, May 27, 2013, pp. 11580–1.
- <sup>418</sup> Ewald testimony, May 27, 2013, p. 11581.
- <sup>419</sup> Exhibit 4112.
- <sup>420</sup> Caughill testimony, May 10, 2013, p. 9260; Exhibit 4112.
- <sup>421</sup> Caughill testimony, May 10, 2013, pp. 9257–8.
- <sup>422</sup> Exhibit 4111.
- <sup>423</sup> Ewald testimony, May 27, 2013, p. 11582.
- <sup>424</sup> Ewald testimony, May 27, 2013, pp. 11582–4.
- <sup>425</sup> Officer testimony, April 22, 2013, pp. 6136–8.
- <sup>426</sup> Exhibit 171.
- <sup>427</sup> Exhibit 171.
- <sup>428</sup> Officer testimony, April 22, 2013, pp. 6143–4.
- <sup>429</sup> Ewald testimony, May 27, 2013, p. 11586.
- <sup>430</sup> Ewald testimony, May 27, 2013, pp. 11650–3.
- <sup>431</sup> Ewald testimony, May 27, pp. 11803–5; Exhibit 3459; see also Clouthier testimony, April 23, 2013, pp. 6468–9.
- <sup>432</sup> Ewald testimony, May 27, 2013, p. 11592.
- <sup>433</sup> Ewald testimony, May 27, 2013, p. 11593.
- <sup>434</sup> Ewald testimony, May 27, 2013, pp. 11592–4.
- <sup>435</sup> Exhibit 170, p. 72; see also Exhibits 1648, 1649, 1650.
- <sup>436</sup> Exhibit 170, p. 74.
- <sup>437</sup> Ewald testimony, May 27, 2013, pp. 11587–8.

- <sup>438</sup> Ewald testimony, May 27, 2013, pp. 11589–90.
- <sup>439</sup> See also Exhibit 4376.
- <sup>440</sup> Ewald testimony, May 27, 2013, pp. 11591–2.
- <sup>441</sup> See also Exhibits 4379, 4380.
- <sup>442</sup> Ewald testimony, May 27, 2013, pp. 11595–6.
- <sup>443</sup> See also Exhibit 4382.
- <sup>444</sup> Ewald testimony, May 27, 2013, pp. 11596–8.
- <sup>445</sup> Ewald testimony, May 27, 2013, p. 11598.
- <sup>446</sup> Ewald testimony, May 27, 2013, pp. 11599–02.
- <sup>447</sup> Ewald testimony, May 27, 2013, pp. 11606–7; Exhibits 4391 to 4393.
- <sup>448</sup> Ewald testimony, May 27, 2013, p. 11607; Exhibit 170, p. 74.
- <sup>449</sup> Ewald testimony, May 27, 2013, p. 11608.
- <sup>450</sup> Ewald testimony, May 27, 2013, pp. 11607–9.
- <sup>451</sup> Ewald testimony, May 27, 2013, p. 11609; Exhibit 1650.
- <sup>452</sup> Ewald testimony, May 27, 2013, pp. 11609–10, 11612, 11553.
- <sup>453</sup> Exhibit 357.
- <sup>454</sup> Bauthus testimony, May 21, 2013, p. 10558.
- <sup>455</sup> Bauthus testimony, May 21, 2013, pp. 10559–60.
- <sup>456</sup> Bauthus testimony, May 21, 2013, pp. 10560–1.
- <sup>457</sup> Hamilton testimony, July 9, 2013, p. 15294.
- <sup>458</sup> Hamilton testimony, July 9, 2013, p. 15296.
- <sup>459</sup> Hamilton testimony, July 9, 2013, pp. 15292–9.
- <sup>460</sup> Exhibit 102, p. 004 (same as Exhibit 170).
- <sup>461</sup> Ewald testimony, May 27, 2013, p. 11621.
- <sup>462</sup> Ewald testimony, May 27, 2013, pp. 11623–4.
- <sup>463</sup> Ewald testimony, May 27, 2013, p. 11624.
- <sup>464</sup> Ewald testimony, May 27, 2013, pp. 11625–6.
- <sup>465</sup> Ewald testimony, May 27, 2013, p. 11626.
- <sup>466</sup> Ewald testimony, May 27, 2013, pp. 11626–7.
- <sup>467</sup> Ewald testimony, May 24, 2013, pp. 11455–6; May 28, 2013, pp. 11934–5; Exhibit 70.
- <sup>468</sup> Ewald testimony, May 28, 2013, pp. 11936–8.
- <sup>469</sup> Ewald testimony, May 27, 2013, pp. 11619–20; Exhibit 3511.
- <sup>470</sup> Bauthus testimony, May 21, 2013, pp. 10564–5.
- <sup>471</sup> Ewald testimony, May 27, 2013, p. 11627.
- <sup>472</sup> Exhibit 3516.
- <sup>473</sup> Bauthus testimony, May 21, 2013, pp. 10563–4.
- <sup>474</sup> Bauthus testimony, May 21, 2013, pp. 10563–5; Ewald testimony, May 27, 2013, p. 11629.
- <sup>475</sup> Ewald testimony, May 27, 2013, pp. 11629–30.
- <sup>476</sup> Bob Nazarian testimony, July 29, 2013, pp. 18602–3; Exhibit 3516.
- <sup>477</sup> Officer testimony, April 22, 2013, pp. 6151–2.
- <sup>478</sup> Bauthus testimony, May 21, 2013, pp. 10589–93.
- <sup>479</sup> Hamilton testimony, July 9, 2013, p. 15297.
- <sup>480</sup> Bauthus testimony, May 21, 2013, pp. 10589–91.
- <sup>481</sup> Bauthus testimony, May 21, 2013, p. 10589.
- <sup>482</sup> Ewald testimony, May 27, 2013, pp. 11629–30.
- <sup>483</sup> Bob Nazarian testimony, July 25, 2013, pp. 18273–9.
- <sup>484</sup> Levon Nazarian testimony, July 15, 2013, pp. 16377–9.
- <sup>485</sup> Bob Nazarian testimony, July 25, 2013, p. 18279.
- <sup>486</sup> Bob Nazarian testimony, July 25, 2013, pp. 18279–80.
- <sup>487</sup> Bob Nazarian testimony, July 25, 2013, pp. 18280–2.
- <sup>488</sup> Bob Nazarian testimony, July 25, 2013, p. 18282.
- <sup>489</sup> Bob Nazarian testimony, July 29, 2013, pp. 18603–6; Exhibit 1324.
- <sup>490</sup> Exhibit 828.
- <sup>491</sup> Wood testimony, June 6, 2013, pp. 13291–2; Exhibit 102, p. 003.
- <sup>492</sup> Fabris testimony, July 11, 2013, p. 15785.
- <sup>493</sup> Fabris testimony, July 11, 2013, pp. 15785–6.
- <sup>494</sup> Wood testimony, June 7, 2013, p. 13422; Exhibit 828.
- <sup>495</sup> Wood testimony, June 6, 2013, p. 13297; Exhibit 102, pp. 004–006.
- <sup>496</sup> Wood testimony, June 6, 2013, pp. 13296–7; Exhibit 102, pp. 004–006.
- <sup>497</sup> Exhibit 1324.
- <sup>498</sup> Fabris testimony, July 11, 2013, p. 15784.
- <sup>499</sup> Exhibit 4483.
- <sup>500</sup> Bob Nazarian testimony, July 25, 2013, pp. 18283–5; Exhibit 828.
- <sup>501</sup> Bob Nazarian testimony, July 30, 2013, pp. 19037–8, 45, 48–49; July 31, 2013, pp. 19212–13, 19217; Exhibits 175, 1259, 4314.
- <sup>502</sup> Bob Nazarian testimony, July 31, 2013, p. 19224.
- <sup>503</sup> Wood testimony, June 6, 2013, p. 13288.
- <sup>504</sup> Wood testimony, June 6, 2013, pp. 13288–9.
- <sup>505</sup> Saunders testimony, June 6, 2013, p. 13133; Exhibit 102, pp. 004–006.
- <sup>506</sup> Saunders testimony, June 6, 2013, pp. 13134–6.
- <sup>507</sup> Saunders testimony, June 6, 2013, pp. 13137–9; Exhibit 102, pp. 004–006.
- <sup>508</sup> Saunders testimony, June 6, 2013, pp. 13139–40.
- <sup>509</sup> Saunders testimony, June 6, 2013, p. 13142.
- <sup>510</sup> Exhibit 103.
- <sup>511</sup> Wood testimony, June 6, 2013, pp. 13246–7.
- <sup>512</sup> Wood testimony, June 6, 2013, p. 13247.
- <sup>513</sup> Wood testimony, June 6, 2013, pp. 13315–16.
- <sup>514</sup> Wood testimony, June 6, 2013, pp. 13249–50.
- <sup>515</sup> Wood testimony, June 6, 2013, p. 13248; Exhibit 11-106.
- <sup>516</sup> Wood testimony, June 6, 2013, p. 13250; June 7, 2013, p. 13465.
- <sup>517</sup> Wood testimony, June 6, 2013, pp. 13250-1; Exhibit 11-106, p. 582.
- <sup>518</sup> Wood testimony, June 6, 2013, p. 13299.
- <sup>519</sup> Wood testimony, June 6, 2013, pp. 13297–9.
- <sup>520</sup> Wood testimony, June 6, 2013, pp. 13299–300.
- <sup>521</sup> Wood testimony, June 6, 2013, pp. 13316–17.
- <sup>522</sup> Wood testimony, June 6, 2013, pp. 13117–18.
- <sup>523</sup> Exhibit 5007, p. 11.
- <sup>524</sup> Wood testimony, June 6, 2013, pp. 13321–2.
- <sup>525</sup> Wood testimony, June 7, 2013, p. 13447.
- <sup>526</sup> Wood testimony, June 6, 2013, p. 13300.
- <sup>527</sup> Yakimov testimony, May 15, 2013, pp. 9898–9.
- <sup>528</sup> Wood testimony, June 6, 2013, pp. 13301–2.
- <sup>529</sup> Wood testimony, June 6, 2013, pp. 13302–3.
- <sup>530</sup> Wood testimony, June 6, 2013, pp. 13303–5.
- <sup>531</sup> Wood testimony, June 6, 2013, pp. 13305–6.
- <sup>532</sup> Wood testimony, June 6, 2013, p. 13307.
- <sup>533</sup> Wood testimony, June 6, 2013, p. 13307.
- <sup>534</sup> Wood testimony, June 6, 2013, pp. 13308–9.
- <sup>535</sup> Wood testimony, June 6, 2013, p. 13309.
- <sup>536</sup> Wood testimony, June 6, 2013, p. 13314.
- <sup>537</sup> Wood testimony, June 6, 2013, p. 13317.
- <sup>538</sup> Exhibit 103.
- <sup>539</sup> Wood testimony, June 6, 2013, pp. 13321–2.
- <sup>540</sup> Wood testimony, June 6, 2013, pp. 13327–8.
- <sup>541</sup> Yakimov testimony, May 15, 2013, pp. 9898–9.
- <sup>542</sup> Wood testimony, June 6, 2013, pp. 13328–9, 32.
- <sup>543</sup> Wood testimony, June 6, 2013, p. 13332.
- <sup>544</sup> Wood testimony, June 7, 2013, pp. 13350–1.
- <sup>545</sup> Exhibit 102, p. 021.
- <sup>546</sup> Wood testimony, June 6, 2013, pp. 13309–11; Exhibit 102, pp. 015, 021.



- <sup>547</sup> Wood testimony, June 7, 2013, p. 13343.
- <sup>548</sup> Wood testimony, June 7, 2013, p. 13344.
- <sup>549</sup> Wood testimony, June 6, 2013, pp. 13311–13.
- <sup>550</sup> Wood testimony, June 7, 2013, p. 13351.
- <sup>551</sup> Wood testimony, June 7, 2013, pp. 13351–2.
- <sup>552</sup> NORR testimony, May 29, 2013, pp. 12226–7, 12229–30.
- <sup>553</sup> Wood testimony, June 7, 2013, pp. 13344–5; Exhibit 1876, p. 041.
- <sup>554</sup> Wood testimony, June 7, 2013, pp. 13346–7.
- <sup>555</sup> Wood testimony, June 6, 2013, pp. 13313–14; Exhibit 102, p. 017.
- <sup>556</sup> Wood testimony, June 6, 2013, pp. 13313–14; Exhibit 102, p. 017.
- <sup>557</sup> Wood testimony, June 7, 2013, pp. 13352–3; Exhibit 102, p. 017.
- <sup>558</sup> Wood testimony, June 7, 2013, pp. 13353–4, 13486–7.
- <sup>559</sup> Wood testimony, June 6, 2013, p. 13290; Exhibit 103 (see also Exhibit 102, p. 011).
- <sup>560</sup> Wood testimony, June 7, 2013, p. 13486; Exhibit 103.
- <sup>561</sup> Wood testimony, June 6, 2013, p. 13290; Exhibit 103 (see also Exhibit 102, p. 011).
- <sup>562</sup> Wood testimony, June 6, 2013, pp. 13323–4; Exhibit 102, p. 011.
- <sup>563</sup> Wood testimony, June 6, 2013, pp. 13324–7.
- <sup>564</sup> Exhibit 103.
- <sup>565</sup> Exhibit 103.
- <sup>566</sup> Wood testimony, June 7, 2013, pp. 13445–7; Exhibit 102, pp. 011, 017, 033.
- <sup>567</sup> Wood testimony, June 6, 2013, pp. 13318–19.
- <sup>568</sup> Wood testimony, June 6, 2013, pp. 13319–20.
- <sup>569</sup> Wood testimony, June 6, 2013, p. 13320; Exhibit 102, p. 017.
- <sup>570</sup> Wood testimony, June 6, 2013, pp. 13320–1.
- <sup>571</sup> Wood testimony, June 7, 2013, p. 13488.
- <sup>572</sup> Bob Nazarian testimony, July 25, 2013, pp. 18292–300; Exhibit 103.
- <sup>573</sup> Levon Nazarian testimony, July 15, 2013, pp. 16374–7; Exhibit 103.
- <sup>574</sup> Fabris testimony, July 11, 2013, pp. 15787–8.
- <sup>575</sup> Fabris testimony, July 12, 2013, pp. 15871–2.
- <sup>576</sup> Exhibit 1446.
- <sup>577</sup> Exhibit 1446.
- <sup>578</sup> Yakimov testimony, May 15, 2013, pp. 9982–84, 10006, 10015–16.
- <sup>579</sup> Yakimov testimony, May 15, 2013, pp. 9916–18.
- <sup>580</sup> Officer testimony, April 22, 2013, pp. 6156–60; April 23, 2013, pp. 6280–2.
- <sup>581</sup> Ewald testimony, May 27, 2013, pp. 11677–8.
- <sup>582</sup> Ewald testimony, May 27, 2013, pp. 11678–9.
- <sup>583</sup> Ewald testimony, May 27, 2013, p. 11681.
- <sup>584</sup> Ewald testimony, May 27, 2013, p. 11680.
- <sup>585</sup> Ewald testimony, May 27, 2013, pp. 11681–2.
- <sup>586</sup> Ewald testimony, May 27, 2013, pp. 11682–3.
- <sup>587</sup> Hamilton testimony, July 9, 2013, pp. 15299–303.
- <sup>588</sup> Exhibit 1443.
- <sup>589</sup> Bauthus testimony, May 21, 2013, p. 10610.
- <sup>590</sup> Wood testimony, June 7, 2013, p. 13458.
- <sup>591</sup> Ewald testimony, May 27, 2013, pp. 11632–3.
- <sup>592</sup> Exhibit 863.
- <sup>593</sup> Ewald testimony, May 27, 2013, p. 11634.
- <sup>594</sup> Ewald testimony, May 27, 2013, pp. 11635–6.
- <sup>595</sup> Ewald testimony, May 27, 2013, pp. 11637–9.
- <sup>596</sup> Ewald testimony, May 27, 2013, pp. 11656–7.
- <sup>597</sup> Ewald testimony, May 27, 2013, pp. 11637–9.
- <sup>598</sup> Ewald testimony, May 27, 2013, pp. 11640–1.
- <sup>599</sup> Ewald testimony, May 27, 2013, p. 11641.
- <sup>600</sup> Ewald testimony, May 27, 2013, pp. 11642–5.
- <sup>601</sup> Ewald testimony, May 27, 2013, pp. 11683–7.
- <sup>602</sup> Ewald testimony, May 27, 2013, pp. 11645–50; Exhibit 103.
- <sup>603</sup> Ewald testimony, May 27, 2013, pp. 11645–50.
- <sup>604</sup> Ewald testimony, May 27, 2013, p. 11666.
- <sup>605</sup> Ewald testimony, May 27, 2013, p. 11662.
- <sup>606</sup> Ewald testimony, May 27, 2013, pp. 11662–3, 11668.
- <sup>607</sup> Ewald testimony, May 27, 2013, pp. 11672–4; Exhibit 170.
- <sup>608</sup> Ewald testimony, May 27, 2013, pp. 11674–5; May 28, 2013, pp. 11888–9.
- <sup>609</sup> Ewald testimony, May 28, 2013, p. 11889.
- <sup>610</sup> Ewald testimony, May 27, 2013, p. 11676.
- <sup>611</sup> Ewald testimony, May 28, 2013, pp. 11866–7; Exhibit 103, p. 136.
- <sup>612</sup> Ewald testimony, May 28, 2013, pp. 11871–3.
- <sup>613</sup> Ewald testimony, May 28, 2013, pp. 11873–4.
- <sup>614</sup> Exhibit 342.
- <sup>615</sup> Exhibit 1443, p. 253.
- <sup>616</sup> Bauthus testimony, May 21, 2013, pp. 10611–13.
- <sup>617</sup> Collett testimony, May 23, 2013, pp. 11252–9.
- <sup>618</sup> Exhibit 863.
- <sup>619</sup> Ewald testimony, May 27, 2013, p. 11690.
- <sup>620</sup> Ewald testimony, May 27, 2013, pp. 11690–2.
- <sup>621</sup> Ewald testimony, May 27, 2013, pp. 11692–6.
- <sup>622</sup> Exhibit 863.
- <sup>623</sup> Ewald testimony, May 27, 2013, pp. 11698–704.
- <sup>624</sup> Exhibit 1443, p. 253.
- <sup>625</sup> Bauthus testimony, May 21, 2013, pp. 10615–16.
- <sup>626</sup> Bauthus testimony, May 21, 2013, pp. 10614–16.
- <sup>627</sup> Hamilton testimony, July 9, 2013, pp. 15312–14; Exhibit 1443.
- <sup>628</sup> Ewald testimony, May 28, 2013, p. 11883.
- <sup>629</sup> Ewald testimony, May 28, 2013, p. 11884; Exhibit 139.
- <sup>630</sup> Ewald testimony, May 27, 2013, pp. 11704–5; Exhibit 169.
- <sup>631</sup> Exhibit 1716.
- <sup>632</sup> Laroue testimony, May 22, 2013, p. 10851.
- <sup>633</sup> Fabris testimony, July 11, 2013, pp. 15789–90.
- <sup>634</sup> Laroue testimony, May 22, 2013, pp. 10870–1.
- <sup>635</sup> Laroue testimony, May 22, 2013, pp. 10854–5.
- <sup>636</sup> Exhibit 904.
- <sup>637</sup> Ewald testimony, May 27, 2013, pp. 11716–17.
- <sup>638</sup> Exhibit 124.
- <sup>639</sup> Laroue testimony, May 22, 2013, p. 10860.
- <sup>640</sup> Exhibit 1462.
- <sup>641</sup> Exhibit 3520.
- <sup>642</sup> Bauthus testimony, May 21, 2013, p. 10595.
- <sup>643</sup> Bauthus testimony, May 21, 2013, pp. 10595–6.
- <sup>644</sup> Bauthus testimony, May 21, 2013, pp. 10596–7.
- <sup>645</sup> Exhibit 11-222.
- <sup>646</sup> Exhibit 3508, p. 139.
- <sup>647</sup> Collett testimony, May 23, 2013, pp. 11244–6; Bauthus testimony, May 21, 2013, p. 10599.
- <sup>648</sup> Exhibit 11-43.
- <sup>649</sup> Exhibit 11-43.
- <sup>650</sup> Bauthus testimony, May 21, 2013, pp. 10601–2.
- <sup>651</sup> Bauthus testimony, May 21, 2013, p. 10602.
- <sup>652</sup> Bauthus testimony, May 21, 2013, p. 10602.
- <sup>653</sup> Collett testimony, May 23, 2013, pp. 11246–8.
- <sup>654</sup> Hamilton testimony, July 9, 2013, pp. 15307–11.
- <sup>655</sup> Exhibit 11-224.
- <sup>656</sup> Collett testimony, May 23, 2013, pp. 11248–52.

- <sup>657</sup> Hamilton testimony, July 10, 2013, pp. 15455–9.
- <sup>658</sup> Hamilton testimony, July 9, 2013, p. 15319.
- <sup>659</sup> Exhibit 1418.
- <sup>660</sup> Bob Nazarian testimony, July 25, 2013, pp. 18302–5.
- <sup>661</sup> Bob Nazarian testimony, July 25, 2013, pp. 18300–1; Levon Nazarian testimony, July 15, 2013, pp. 16384–8; Exhibit 5464.
- <sup>662</sup> Bob Nazarian testimony, July 25, 2013, pp. 18300–1; Levon Nazarian testimony, July 15, 2013, pp. 16384–8; Exhibit 5464.
- <sup>663</sup> Levon Nazarian testimony, July 15, 2013, pp. 16390–1; Exhibit 1632.
- <sup>664</sup> Bob Nazarian testimony, July 25, 2013, pp. 18300–1; July 26, 2013, pp. 18317–21; Levon Nazarian testimony, July 15, 2013, pp. 16384–8; Exhibit 5475, p. 007.
- <sup>665</sup> Bob Nazarian testimony, July 25, 2013, pp. 18301–2; Exhibit 356, p. 5403.
- <sup>666</sup> Exhibit 356, p. 5401; Sprague testimony, July 12, 2013, pp. 16082–4.
- <sup>667</sup> Exhibit 1034.
- <sup>668</sup> Sprague testimony, July 12, 2013, pp. 16088–89, 91.
- <sup>669</sup> Sprague testimony, July 12, 2013, p. 16095.
- <sup>670</sup> Sprague testimony, July 12, 2013, pp. 16086–93, 16138–40.
- <sup>671</sup> Bauthus testimony, May 21, 2013, p. 10619.
- <sup>672</sup> Collett testimony, May 23, 2013, pp. 11260–3.
- <sup>673</sup> Hamilton testimony, July 9, 2013, pp. 15315–17.
- <sup>674</sup> Ewald testimony, May 27, 2013, p. 11707–15, 11829, 11835.
- <sup>675</sup> Bob Nazarian testimony, July 25, 2013, pp. 18305–7; Exhibit 1034, p. 5444.
- <sup>676</sup> Sprague testimony, July 12, 2013, pp. 16093–7.
- <sup>677</sup> Exhibit 337.
- <sup>678</sup> Exhibit 337.
- <sup>679</sup> Bob Nazarian testimony, July 26, 2013, pp. 18314–17; Exhibit 337.
- <sup>680</sup> Exhibit 4245.
- <sup>681</sup> McCulloch testimony, June 13, 2013, pp. 14469–70; Exhibit 5147, p. 069.
- <sup>682</sup> McCulloch testimony, June 13, 2013, p. 14470; Exhibit 13-168, p. 028.
- <sup>683</sup> McCulloch testimony, June 13, 2013, p. 14471.
- <sup>684</sup> McCulloch testimony, June 13, 2013, pp. 14471–3; Exhibit 4246.
- <sup>685</sup> McCulloch testimony, June 13, 2013, p. 14473; Exhibit 4247, p. 634.
- <sup>686</sup> McCulloch testimony, June 13, 2013, pp. 14473–4; Exhibit 13-169, p. 694.
- <sup>687</sup> McCulloch testimony, June 13, 2013, pp. 14474–5; Exhibit 13-38, p. 056.
- <sup>688</sup> McCulloch testimony, June 13, 2013, p. 14476; Exhibit 4248, p. 633\_01.
- <sup>689</sup> McCulloch testimony, June 13, 2013, p. 14476; Exhibit 13-40, p. 201.
- <sup>690</sup> Exhibit 4250.

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Between the beginning of 2010 and the end of 2011, while Eastwood engaged in much talk about reaching a real solution to the Mall's problems, no real action was taken. The City, tenants, and the public were told that progress was being made at the same time as the Nazarians tried to sell the Mall or to refinance it to get more money out of their investment. Although the City received clear warnings of potential structural deficiencies at the Mall, it did nothing to see that any repairs were carried out.

## **January–May 2010: Iftikhar Hossain continues to explore acquiring the Mall but does not close the deal**

Iftikhar Hossain's interest in acquiring the Mall continued in 2010. On January 4, 2010, Mr. Hossain met with Mr. Bauthus. Mr. Bauthus's notes of the meeting indicate that Mr. Hossain was "interested in Mall." Mr. Bauthus testified that, although he told Mr. Hossain that the Mall was important to the City, he did not tell him anything about the leaking.<sup>1</sup>

### **Mr. Hossain identifies discrepancies in reported financial performance**

On January 25, 2010, Mr. Hossain emailed Marty Ditchburn, a real estate broker who represented the Nazarians, regarding discrepancies between the figures in the financial statements provided to Mr. Hossain and the figures that purported to show the financial performance of the Mall and Hotel for the year 2008 presented in a sale's brochure prepared by Levon Nazarian. Specifically, Mr. Hossain wrote:

With my accountant, we have tried to make sense of the bottom line from the financials that they have provided compared to what was disclosed in the brochure. With all the adjustments in the financials, it appears that the Net is approximately \$425k below than [*sic*] it was shown in the brochure for the year 2008.<sup>2</sup>

Levon Nazarian testified he was not sure which of the many financial statements that had been prepared for 2008 were provided to Mr. Hossain.<sup>3</sup> As I explained in the previous chapter, he was unable to explain the discrepancies between the numbers in the brochure and those in the many financial statements prepared for the same period other than to blame Eastwood's accountant, Sam Hurmizi.<sup>4</sup> He did later testify that he would "take responsibility for that" because he had not taken the necessary steps to ascertain accurate numbers.<sup>5</sup>

### **Mr. Hossain enters into another agreement of purchase and sale**

In spite of his questions about the discrepancy in the figures provided on the Mall's financial performance, Mr. Hossain entered into a further agreement of purchase and sale on January 29, 2010, in which the offered purchase price was \$7.7 million. This price was \$2.5 million less than his original offer of October 2009. When Bob Nazarian was asked whether the reduction in price was as a result of the financial statements provided to Mr. Hossain, he replied that he accepted a lower price because he "just wanted to sell at that time."<sup>6</sup>

For his part, Levon Nazarian testified he did not know that the reduction in price was a result of the financial information given to Mr. Hossain, but he assumed so. Levon Nazarian had given Mr. Hossain the 2009 M.R. Wright engineering report but he did not think the report had an effect on the price offered.<sup>7</sup>

The offer included a financing condition that had to be fulfilled by March 15, 2010.



## Levon Nazarian provides false information to purchaser to facilitate financing

On February 12, 2010, Mr. Hossain's lawyer, Roger Nainby, wrote to Eastwood's lawyer, Daniel Botelho, requesting current financial statements and answers to a list of due diligence related questions. Included among the questions and requests were:

- "Details of any disputes with tenants (particularly Bank of Nova Scotia) and any tenant defaults, including rental arrears"; and
- "What is the status of repairs to the rooftop parking surface and mall roof?"<sup>8</sup>

Levon Nazarian testified that he read the letter and subsequently sent it back to his lawyer. He testified that he was not sure whether he saw the list of due diligence questions, but said he would have forwarded the questions to the Mall manager or to their accountant.<sup>9</sup>

On February 17, 2010, Mr. Nainby wrote to Mr. Hossain: "We have gone through the leases and the rent roll and there are many questions we have as to discrepancies between the lease files and the rent roll, as well as missing files on some tenants."<sup>10</sup> On February 24, 2010, Levon Nazarian replied to Mr. Nainby's correspondence of February 12.<sup>11</sup> He testified he would not have drafted the answers to the due diligence questions that he enclosed with his letter and did not know if he had read them.<sup>12</sup> In answer to the question "What is the status of the repairs to the rooftop parking surface and mall roof?" the answer provided was "*Perfect*."<sup>13</sup> Levon Nazarian agreed that statement was false. The repairs to the parking surface and the Mall roof were not perfect.<sup>14</sup>

In answer to the question "Details of any dispute with tenants (particularly Bank of Nova Scotia) and any tenant defaults, including rental arrears," the answer provided was simply "Scotia Bank." Levon Nazarian acknowledged that the Bank of Nova Scotia was, at that time, withholding between \$100,000 and \$150,000 for expenses related to the cleanup from leaks. He acknowledged that the response could have been much more thorough but that, unfortunately, it was not.<sup>15</sup>

Levon Nazarian was aware that the responses were very important for Mr. Hossain to satisfy the financing condition of the agreement of purchase and sale, which, if the transaction was completed, would allow the Nazarians to finally divest themselves of their unwanted Mall. He testified:

Q. I mean that's what happened. Obviously the purchaser's lawyer has written your lawyer. He's passed it on to you and said we need these questions answered. You got this information and then you passed it on; right?

A. Well, somebody drafted these answers and sent it to me and I sent it on, yes.

Q. Is that what happened?

A. I believe so.

Q. Do you know that?

A. Well, sir . . .

Q. There are only two possibilities. Somebody drafted it or you wrote it; which is it?

A. It wouldn't be me because I would have my letterhead on it.

Q. Okay. Did you read it before you sent it on?

A. I don't know. I don't – I don't think so.

Q. Well, sir, you've been working on trying to sell this property at this stage for over a year; right?

A. Correct.

- Q. And your father seriously wanted to sell the property.
- A. Yes. Absolutely.
- Q. He wanted it off his hands?
- A. That's a fair statement.
- Q. And you agreed with that.
- A. I would agree with that, yes.
- Q. You wanted your father to get it off his hands?
- A. Yes.
- Q. Because it was not – your father was not happy with it and you wanted to see the problem removed; right?
- A. I think, personally speaking, I think it was killing his health so, yes, I wanted it off his hands.
- Q. So you knew this was very important.
- A. Yes.
- Q. And you knew that the information which is requested by the lawyer as part of the due diligence process, was very important because if it didn't satisfy the purchaser, the deal would not close; right?
- A. If it didn't satisfy the purchaser, then the purchaser has the ability to counter offer or, yes, leave.
- Q. And in this particular Agreement of Purchase and Sale, the condition was a financing condition; right?
- A. Yes, sir.
- Q. And so what was needed, as Mr. Nainby says in his letter, was information to satisfy the lender; right?
- A. That's correct.
- Q. And if the lender was not satisfied, the loan would not be offered and the condition would not be met and the land would not be sold; right?
- ...
- A. Correct.
- Q. So, to sell the land you needed to satisfy the lender?
- A. Yes.
- Q. Okay. And so I suggest to you that you would have carefully reviewed the information which was provided to ensure: a) that it was accurate; b) that it would provide the information which was asked for, so the lender would be satisfied; is that fair?
- A. That would have been prudent.
- Q. Is that not what you did?
- A. Well, like I said, I would forward this information because I would not know the answers to these questions. I would forward it to probably the mall manager at the time, get the answers and forward it over. Whether I reviewed it or not, Mr. Doody, I can't say because I don't know. I – right now, I don't recall ...<sup>16</sup>

Levon Nazarian stated that he could not remember reviewing the document. It is difficult to accept at face value that he neither drafted nor read the information he provided to Mr. Hossain. What interest would the accountant or the Mall manager have in making these false statements? But, even if what he says is true, there can be no doubt that Eastwood was conveying a deliberate falsehood to the purchaser. That is hardly surprising, in the light of previously described actions by its principals.

## The agreement with Mr. Hossain is terminated: Mr. Hossain could not get financing

On March 9, 2010, Mr. Botelho wrote Mr. Nainby stating that Eastwood would not be extending the financing condition that was then scheduled to expire on March 15, 2010, because Mr. Hossain had disclosed the existence of the transaction in contravention of the confidentiality provisions of the agreement of purchase and sale.<sup>17</sup> Levon Nazarian testified that he instructed Mr. Botelho to send this letter because Mr. Hossain had told Mall staff he had acquired the Mall and notified the power company that he now owned the Mall.<sup>18</sup>

By March 15, 2010, Mr. Hossain had not met the financing condition.<sup>19</sup> As a result, the deal between Eastwood and Mr. Hossain had been terminated and the agreement was null and void.<sup>20</sup> On March 16, 2010, Mr. Nainby wrote to his client confirming that the deal was terminated and advising that, if he was going to pursue further negotiations in connection with buying the Mall, the prior negotiations should not get in the way. Mr. Nainby added, “I am distrustful of the vendor.”<sup>21</sup>

Mr. Hossain responded the same day, indicating he was going to meet with Bob Nazarian the next day to “get a sense of what he is up to.” Mr. Hossain also indicated the following:

Please note that BDC [Business Development Bank of Canada] was not willing to finance because of Scotia non-payment of the rent and Shoppers leaving. Yesterday we have explained the situation, which was well received. Dollarama is already waiting to get additional space that might become vacant if Shoppers leave. So there will not be any net loss. At this time we do not want to jeopardize the financing process as you know no one else wants to finance this property other than private fund which is expensive.<sup>22</sup>

Levon Nazarian agreed that, between the time this letter was written and the time of the collapse, Dollarama had not signed an agreement to get additional space, although he testified Eastwood was “just about to sign that agreement” before the collapse.<sup>23</sup>

The dealings between the Nazarians and Mr. Hossain are typical of the way the Nazarians conducted business generally. Eastwood and the Nazarians repeatedly provided Mr. Hossain with information that was either misrepresentative or false. Mr. Hossain’s counsel had good reason to be “distrustful” of the Nazarians.

**The dealings between the Nazarians and Mr. Hossain are typical of the way the Nazarians conducted business generally. Eastwood and the Nazarians repeatedly provided Mr. Hossain with information that was either misrepresentative or false.**

## Mr. Hossain tries again to buy the Mall and again cannot obtain financing

By letter dated March 18, 2010, Mr. Nainby wrote to Mr. Botelho indicating his client had requested that the Business Development Bank of Canada continue to look at Mr. Hossain’s request for financing of the purchase of the Mall from Eastwood. Levon Nazarian testified that he was aware of this letter and he was agreeable to attempting to reach an agreement with Mr. Hossain.<sup>24</sup> On May 16, 2010, Eastwood entered into another agreement of purchase and sale with Mr. Hossain for \$7.7 million, the same price as the earlier aborted agreement. It was subject to a financing condition that had to be satisfied by May 31, 2010.<sup>25</sup>

Mr. Hossain actively attempted to close this deal. On May 12, 2010, he provided a deposit of \$100,000. Levon Nazarian agreed this indicated that Mr. Hossain was making a serious attempt to revive the deal; Levon himself was hopeful that the deal would close.<sup>26</sup> Mr. Hossain retained Pinchin Environmental to follow up on



its 2009 building condition assessment. Pinchin understood that Mr. Hossain was a potential purchaser of the Mall. Although Pinchin conducted an inspection on behalf of Mr. Hossain, it never disseminated a report of its 2010 inspection.<sup>27</sup>

On May 31, 2010, however, Mr. Hossain's solicitor advised Mr. Botelho that Mr. Hossain had been unable to secure financing, and that, accordingly, the financing condition was not met and the offer to purchase the Mall was null and void.<sup>28</sup>

## July–October 2010: The Nazarians try unsuccessfully to “get rid of” or refinance the Mall

### Many offers, no sales

The Nazarians' interest in getting the Mall off their hands did not end with their frustrated efforts to sell it to Mr. Hossain. They continued to entertain multiple offers. Levon Nazarian received a “non-binding letter of intent” from Value Centres of Concord, Ontario, on July 28, 2010, to purchase the Mall for \$7 million. The payment schedule included a cash payment of \$4.5 million and required Eastwood to take back a mortgage on a 10-year term for the balance of the purchase price. Levon Nazarian testified that they took every offer to purchase the Mall seriously but that there were also many offers and it was not clear whether all of them were serious. There were a lot of speculators or “tire kickers,” who at one time or another expressed an interest in acquiring the Mall.<sup>29</sup>

On July 30, 2010, Levon Nazarian responded to the broker for Value Centres. He wrote:

I looked at the LOI [letter of intent] that you had sent me, and I showed it to the owner of the property. Please don't take this the wrong way, but to be very blunt, I consider this offer a joke as well as insulting. We are not at all interested in this LOI nor will we even respond. The asking price is \$9.9 million. We do have room to negotiate but nowhere near to what your client has offered us. Let us know when he is more serious.<sup>30</sup>

In his testimony, Levon Nazarian characterized his reaction as being a negotiation tactic.<sup>31</sup> He testified that, at that time, he was very keen on selling the property. Indeed, he wanted to “get rid of it.”<sup>32</sup>

On August 8, 2010, a signed offer to purchase was received from another prospective purchaser, BBM Properties Inc. The agreement had a purchase price of \$8 million and proposed a vendor-take-back mortgage of \$3.78 million. Levon Nazarian testified that Eastwood was not interested in a vendor-take-back mortgage of that size because they wanted to realize more cash proceeds on any sale of the Mall. Nor were they interested in offers to purchase that included a due diligence period of longer than 30 to 45 days because they locked the property up, effectively preventing it from being sold during the due diligence period.<sup>33</sup>

Levon Nazarian could not recall what happened with this offer.<sup>34</sup>

On August 12, 2010, Eastwood received an offer from Winchester Financial Corporation to purchase the Mall for \$7.7 million.<sup>35</sup> Levon Nazarian testified he was excited about this offer because Winchester was the owner of a mall in Espanola, which he characterized as “essentially another B market.”<sup>36</sup> Levon Nazarian testified that, when he followed up, he learned that the prospective purchaser had already acquired another property and was no longer interested in buying the Mall in Elliot Lake.<sup>37</sup>

On August 23, 2010, Eastwood received an offer to purchase from a prospective purchaser named Ochiltree Management Inc. for \$9 million.<sup>38</sup> It proposed an assumption of the first mortgage (then in the amount of approximately \$3 million to \$4 million) by the prospective purchaser and Eastwood taking back a second mortgage of \$2 million. Levon Nazarian testified he was hesitant to proceed with this offer because, as the second mortgagee, Eastwood would be assuming significant risk. If the first mortgage being administered by the Royal Bank went into default, it would receive the first money from any sale; if Eastwood was the second mortgagee, it would receive only whatever money was left over after the first mortgage debt had been paid.<sup>39</sup> The Nazarians did not appear confident about the Mall's value.

Between September 7 and 12, 2010, Bob Nazarian exchanged offers with a prospective purchaser who had, by a letter of intent, offered to purchase the Mall for \$6.5 million. Bob Nazarian counter-offered \$8.5 million, and the prospective purchaser responded with an offer of \$7 million. Levon Nazarian testified that, from his recollection, an agreement was reached to sell the Mall for \$8 million. He further testified that the prospective purchaser was from Libya but that the offer never went anywhere. There was no deposit and, although Levon Nazarian attempted to contact the prospective purchaser on numerous occasions, he never heard back from him.<sup>40</sup>

Levon Nazarian testified that, in his efforts to sell the Mall in 2010, he “just wanted to get rid of it” in order to protect his father's health. His father shared that view.<sup>41</sup>

### **Eastwood Mall Inc. attempts to secure financing**

According to Levon Nazarian, in October 2010, the Nazarians started the process of trying to secure a loan from the Business Development Bank of Canada in order to build a new parking lot and eliminate the rooftop parking. He testified that Eastwood needed about \$1.5 million but wanted as much as it could get.<sup>42</sup> As will be seen, the efforts to borrow from BDC continued up to the date of the collapse.

At the same time, Eastwood was seeking financing from the Canadian Imperial Bank of Commerce (CIBC), but Levon Nazarian testified that, ultimately, CIBC did not want to lend to a business located in Elliot Lake.<sup>43</sup>

### **Conclusion: Eastwood wanted to sell the Mall but could not because of its own actions**

It is clear to me that, throughout 2010, Eastwood concentrated its efforts on selling the Mall rather than fixing the leaks and maintaining the building. There was a great deal of interest from prospective purchasers, but no purchase came to fruition. This was, to a great degree, the result of the Nazarians' own actions – the duplicitous financial information, failure to deal in a forthright manner, and, most importantly for this Inquiry, their failure to fix the leaks.

**It is clear to me that, throughout 2010, Eastwood concentrated its efforts on selling the Mall rather than fixing the leaks and maintaining the building.**

## Water continues to leak into the Mall

While Bob and Levon Nazarian were evidently spending a lot of their time trying to get the Mall off their hands, water continued its incessant infiltration of the rooftop parking deck.

### Leaks continue in the Bank of Nova Scotia and Zellers

The leaks persisted in the Bank of Nova Scotia branch. On March 18, 2010, Judy McCulloch, the bank's branch manager of customer service, called her head office to advise that there were no leaks in the bank but that the lack of carpeting had caused a customer to fall.<sup>44</sup> However, by April 8, 2010, the branch was leaking again. Ms. McCulloch testified that she alerted the Mall management about the leaks at that time.<sup>45</sup>

Although there were fewer communications between Brian Cuthbertson, Zellers' manager, and the Mall management about the leaks in his store between 2010 and 2012 than before, he testified that the leaks continued. On June 22, 2010, Mr. Cuthbertson reported that there were 33 different leaks in Zellers after the first day of heavy rain in the summer of 2010.<sup>46</sup>

The leaking continued to be problematic in the bank. The branch manager, Laurie Wiens, took photographs of the effect of the leaking on September 10, 2010, which showed, among other things, the buckets that the bank staff used to catch the leaks<sup>47</sup> (see figure 1.11.1). Later that month, the bank staff complained about various symptoms related to the conditions at the branch. As a result, Pinchin conducted a mould and indoor air-quality assessment.<sup>48</sup> Its report noted:

Water continues to leak through to the ceiling of the teller area, waiting area, open office area and kitchen / storage room during periods of heavy rain. Buckets have been placed on locations where some of the water leaks have repeatedly occurred. Affected lay-in ceiling tiles are routinely replaced after every heavy rainfall;

The wall and ceiling finishes removed in August 2008 and June 2009 have not been replaced ...<sup>49</sup>



**Figure 1.11.1** Conditions in the Mall's Bank of Nova Scotia branch, September 2010

Source Exhibits 5127 and 5112



Although Pinchin did not find the presence of concealed mould growth, it recommended that the source of the roof leaks be repaired.<sup>50</sup> This report was provided to Eastwood, but Ms. McCulloch testified that she did not believe that Eastwood took any steps to repair the roof beyond its established practices.<sup>51</sup>

On October 4, 2010, Antoine-René Fabris, Eastwood's lawyer, sent a letter to Kim McAllister at the Bank of Nova Scotia's head office, writing that the actions of the bank's staff at the branch in Elliot Lake "mirror their wish to have a new facility built ... There have been no substantial leaks in the area, and I think that hysteria is taking over your staff."<sup>52</sup> Ms. McCulloch testified that she did not see this letter at the time it was sent but, when she did see it, she was angry. It was her evidence, which I accept, that – despite Mr. Fabris's bald assertions to the contrary – the leaks in the branch continued throughout 2010–11, until the branch moved out of the Mall permanently. Eastwood should have taken the bank's concerns seriously.<sup>53</sup>

## Report for Royal Bank observes rusting and leaking

On September 17, 2010, Canadian Mortgage Rating Service Ltd. prepared an inspection report for the Royal Bank Mortgage Corporation. It detailed numerous observations about the state of disrepair in the Mall. The observations provide a troubling glimpse into the Mall that were manifestly apparent to the RBC inspector. Although Bob Nazarian did not have access to this report, he was asked about the accuracy of its observations, which noted that

- the management of the property appeared to be "inadequate." Bob Nazarian did not agree with that observation.
- the outdoor walkway was leaking and had rusting metal support beams. Bob Nazarian testified that, at one point, the outdoor walkway was probably leaking and rusting.
- there was an active roof leak in the main Mall corridor. Bob Nazarian testified that this was "very much possible."
- there was an active roof leak in Dollarama. Bob Nazarian testified that this was "possible."
- there were numerous active roof leaks in Zellers. When asked whether this was accurate, Bob Nazarian testified that "everything is possible, yes."
- there were active roof leaks in the public library space. Bob Nazarian testified that this was possible.
- "[t]he overriding issue with the exterior is the continued problems with water infiltration from the parking deck. Previous repairs that were thought to be satisfactory during the previous inspection have not held up." Bob Nazarian testified that this was "possible."
- the "rusting steel support columns are a structural concern." Bob Nazarian testified that Eastwood had retained a welder to reinforce the exterior staircase but the welders did not do anything with the structural steel that was supporting the core slabs inside the Mall.<sup>54</sup>

Bob Nazarian did not deny the existence of such disrepair and water infiltration. But, as was his custom throughout so much of his testimony, he chose to equivocate, repeatedly resorting to words such as "possibly" rather than answering a question directly. The exchanges summarized above confirm my earlier observation that Mr. Nazarian's credibility was problematic throughout his evidence.

## The City takes no steps to stop water from infiltrating the Mall

### Mr. Hossain makes inquiries with Mr. Bauthus about the Mall

Mr. Bauthus testified that he had spoken to “some individuals” around Christmas 2009 who had said they were interested in the Mall.<sup>55</sup> He had made a note on January 4, 2010, writing “Iftikhar” (Mr. Hossain’s first name), a phone number, and “re meeting in Dec. re business opportunity in E.L. – interested in Mall – what City wants with the Mall.”<sup>56</sup> Mr. Bauthus recalled telling him what the City was doing “and that the Mall was important to the City.” He did not tell him anything about the leaks.<sup>57</sup> It was his evidence that he probably told Bruce Ewald, chief building official, that there were some people interested in the Mall.<sup>58</sup>

As I have indicated above, an agreement of purchase and sale was entered into between Mr. Hossain and Eastwood on January 29, 2010.

### Mr. Ewald rescinds the 2009 Property Standards Order

On February 11, 2010, Mr. Ewald sent a letter to Bob Nazarian advising him that:

Subsequent to an inspection today February 11, 2010 of the Algo Mall ... I find that all conditions of the Property Standards Order issued on September 25, 2009 have been completed ... Please accept this letter as your notification that all matters pertaining to the order have been labelled complete and this order is now rescinded.<sup>59</sup>

The order required two things – that a report be obtained from a structural engineer and that the leaks be fixed. Mr. Ewald agreed with this when he testified.<sup>60</sup> Mr. Ewald testified he did not notice any leaks during his inspection that day. It was his evidence that the inspection would have lasted between half an hour and an hour, although “[a]ctually, I don’t have any recollection of doing it, other than the fact that this letter says that I went over and did it.” He took no notes.<sup>61</sup>

Mr. Ewald testified he sent the letter because he had concluded that the leaks had been fixed. Mr. Ewald explained how he arrived at such a conclusion:

Q. I assume by issuing this order on February 11th, you concluded that the leaks had been fixed, right?

A. Yes.

Q. What caused you to come to that conclusion?

A. My inspection in November, and I’d been back over to the mall on three or four occasions after that, to take a look at the fireproofing material. Obviously, when looking at the fireproofing material I was looking – I mean, if I saw leaks coming through, I would have stopped them from doing the fireproofing material, because it can’t be applied onto a wet surface. So I’d been in the mall probably upwards of a half-dozen times from November through to the end of December. I don’t believe – I believe by the latter part of December or, you know, or even the early part of January, all of the fireproofing, I believe, was completed, so I don’t know that I was there later in January at all.

Q. And typically it didn’t leak in the winter?

A. It would be unusual, I think, if it did with – with – unless we had very warm weather.

Q. Right. And in order to come to that conclusion, that the leaks had been fixed, I take it from your earlier evidence, you did not determine how they’d gone about doing it?

A. Well, I was aware that they had routed out a – quite a number of the grout lines and re-caulked everything.

Q. Everything?

A. Well to the best of my knowledge, yes. I don’t know whether it was everything.

Q. Did you ask?

A. I may have. I have no – no distinct recollection of doing that.

Q. Do you have an indistinct recollection of asking?

A. No. No.<sup>62</sup>

Although Mr. Ewald testified that no one from the City spoke to him about dealing with the September 2009 order before issuing this letter,<sup>63</sup> Mr. Bauthus's evidence was that Mr. Ewald "probably" mentioned that he was sending a letter to Mr. Nazarian.<sup>64</sup> He also testified:

Q. And, sir, you knew at this time that the building still leaked, right?

A. Yes, sir.

Q. And did you say to Mr. Ewald, well, how can you send this letter if the order said fix the leaks and the building was still leaking?

A. I didn't take note of that. I looked at the aspect of the structural issue and that part had been responded to by the engineer.

Q. Or so you had been told?

A. That is what – yes, sir.<sup>65</sup>

## Mr. Hossain inquires about outstanding work orders

On February 18, 2010, Mr. Nainby, on behalf of Mr. Hossain, wrote to Lesley Sprague, City clerk, asking for a certificate indicating outstanding work orders or orders about building infractions for the Mall.<sup>66</sup>

Mr. Ewald agreed that if there were outstanding work orders, it might have impeded the closing of the transaction. He testified, however, that he did not know that the Mall was in the process of being sold when he rescinded the order on February 11, 2010. Mr. Ewald also denied having been told by Mr. Bauthus that he had spoken to Mr. Hossain or someone on his behalf regarding his possible purchase of the Mall.<sup>67</sup>

## Conclusion: Mr. Ewald may well have rescinded the order in order to facilitate a sale of the Mall

Mr. Ewald's rescission of the 2009 Property Standards Order in February 2010 is, in retrospect, difficult to justify. He had no reliable basis to conclude that the leaks had stopped. Mr. Ewald's inspection of the Mall was manifestly cursory – he had no recollection of it and took no notes. Moreover, his inspection was in wintertime, when the Mall rarely leaked. It was unreasonable for him to conclude that the leaks had stopped. There is no evidence that anyone told him that the leaks were stopped. Nor had he asked.

Further, it is perplexing that no one else from the City – officials who were doubtlessly aware or ought to have been aware that the Mall's leaks probably had not been fixed – raised a concern about rescinding the order. Mr. Ewald could have waited until spring to see if the leaks had been fixed if that was the reason that he wanted to rescind the order. I accept Mr. Bauthus's evidence that he probably told Mr. Ewald, before the order was rescinded on February 11, 2010, that someone was interested in purchasing the Mall. I would be surprised if he were not aware that the Mall appeared to have deteriorated during Eastwood's ownership.

There was a commonly held view at city hall that the Mall was important to the community. One need not be particularly cynical to at least suspect that the rescission of the order was related to the knowledge that a third party was interested in the purchase of the Mall.



## Building inspectors do not see leaks in the Mall in 2010

Chris Clouthier, building inspector, testified that he conducted several inspections at the Mall in 2010. All were about tenants' renovations for plumbing. None were in respect of a complaint under the Property Standards By-law. Mr. Clouthier testified that he did not recall seeing any leaks during these inspections or at any time since his inspection of October 2006 with Mr. Allard that had resulted in the Notice of Violation.<sup>68</sup>

## The City fails to address leaks in the Library in 2010

The City's senior management team met on September 29, 2010 and discussed the damage suffered by the Library due to rain. Mr. deBortoli testified that he was aware, at that time, that the leaks in the Library were continuing.<sup>69</sup> At a subsequent meeting of the senior management team on October 19, 2010, the issue of damage in the Library was again discussed. The meeting minutes indicate that "[t]here are 30 tiles in total that need replacing. The CAO [chief administrative officer] advised that he will be calling also [the Mall manager]."<sup>70</sup> Mr. deBortoli testified that he did not discuss with Mr. Ewald, either at this meeting or afterward, what could or would be done about leaks in the Library because it was his understanding that Mr. Ewald and Fire Chief Paul Officer were dealing with the issues at the Mall. Mr. deBortoli also acknowledged that, even though he was aware that the City's 2009 Property Standards Order included a requirement that Eastwood fix the rooftop parking deck, he did not ask Mr. Ewald why – a year later – the Mall roof was still leaking.<sup>71</sup>

The librarian's monthly reports to the Library board in April, May, June, July, August, September, and November 2010 show that the Library continued to have concerns about, and was having to address, the impact of the leaks in the Library premises.<sup>72</sup>

Despite this ongoing reporting to the Library board (which included two representatives from City Council), it appears the City continued its failure to take notice of, or at least acknowledge taking notice of, the true state of affairs in the Library. Mayor Richard Hamilton testified that he did not see any of the librarian's reports to the Library board and did not ask any questions about the leaks in 2010. Mayor Hamilton acknowledged his incuriosity:

- Q. Can you tell me why you would not have asked questions, given the concern of the library which had been strong and about not wanting to renew the lease because of the leaks and given the history of concerns with the leaks and the possible structural damage, why didn't you ask any questions about what was happening?
- A. Well I didn't think to ask the questions. And we did have a member on the Library Board; I believe there was two at that time, and they never raised any issues with us.
- Q. Would you agree with me that the dispute with the library about renewing the lease was the very contentious item in 2009?
- A. Yeah, it was contentious, yeah.
- Q. It was one of the more contentious things that you had to deal with in your term as mayor; correct?
- A. I don't know if I would say that.
- Q. Okay, well, we won't ask you about the other ones.
- A. It is just – there was a few of them out there, yeah.
- Q. And it was resolved and the Library was not happy?
- A. Correct.
- Q. And you continued – well, let me back up. The library was not happy and yet you asked no questions about what the situation was thereafter?

- A. No.
- Q. Nor did you ask any questions about what was happening with the order issued in September of 2009 that the leaks be fixed; is that right?
- A. That's correct, yes.<sup>73</sup>

I cannot understand this apathy.

## Fall 2010: Engineer Philip Sarvinis retained to provide advice on the roof

In November 2010, Eastwood contacted Philip Sarvinis, an engineer with the firm of Read Jones Christoffersen (RJC).<sup>74</sup> Mr. Sarvinis had more than 20 years' experience, with a particular focus on the areas of building science (including waterproofing) and parking planning.<sup>75</sup> He met with Bob and Levon Nazarian in Toronto on November 5, 2010. Mr. Sarvinis testified that Eastwood's primary concern was to eliminate the parking on the roof and maximize parking elsewhere on the lot. A secondary concern was to waterproof the roof. Levon Nazarian agreed that he and his father told Mr. Sarvinis at this meeting that they wanted to eliminate parking on the roof – because “it just didn't make sense, both structurally, I believe, and as a design component, as well as a convenience to the elderly people.”

On November 8, 2010, Mr. Sarvinis sent a letter to Bob Nazarian confirming that his firm had accepted the assignment to act as engineering consultants on a proposed “revitalization project” for the Mall. The letter stated that the firm's services would include:

- Addressing the roof leakage problem.
- Reviewing options for solar panel installation on the roof.
- Re-structuring of the parking layout to maximize the use of the land and eliminate the excessive slope in the parking fields.
- Review possibility of structured parking to eliminate roof top parking.
- Develop a parking lot for the wooden [sic] land in the southwest corner of the site.<sup>76</sup>

The item “[r]eviewing options for solar panel installation on the roof” referred to an Ontario government program that paid solar companies a premium for solar power. This possibility was interesting for Eastwood because the solar company, if placing panels on the Mall roof, would typically pay for the installation of a waterproofing membrane, pay rent for use of the roof space, and maintain the roof throughout the 20-year lease.<sup>77</sup> The “parking lot for the woode[d] land in the southwest corner of the site” was a reference to the treed area between the fire station and the Mall that Eastwood had proposed purchasing from the City (actually in the northwest corner).<sup>78</sup>

## Mr. Sarvinis's preliminary review: The solar solution will not work – either remove all parking on the roof or put on a thin membrane; The price is too high for Eastwood

Mr. Sarvinis's letter of November 8 went on to say that, since it was not possible to determine the exact amount of time required, he proposed to charge on an hourly basis, with a budget of \$15,000 to \$18,000.<sup>79</sup> Levon Nazarian testified that he had “spearheaded” this project and he was “okay with” Mr. Sarvinis's proposal. He was not sure if he had consulted his father.<sup>80</sup> Mr. Sarvinis requested copies of prior engineering reports but was not provided with any. He was therefore not aware of the Trow, Halsall, and other engineering reports until his involvement with this Commission. When asked, he agreed that they would have been very useful information to have.<sup>81</sup>

Mr. Sarvinis visited the Mall on November 25, 2010, to get a sense of the available land and layout of the property. He went alone, stayed only for a day, and did not meet with Mall management. During this brief visit,

**During this brief visit, Mr. Sarvinis noticed the multitude of repairs that had been carried out on the roof over the years, including localized concrete repairs and the use of different types of sealants. He also saw signs of ponding water. Some of the repairs seemed to work, some were poorly done, and others looked older and in need of replacement. His overall impression was that Eastwood was not able keep ahead of the leaks through repairs.**

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Mr. Sarvinis worked only from the original drawings and designed load capacity of the roof. Using this information, he was confident, without having inspected its actual condition, that the roof could support the loads associated with the proposals he would make, including the extra weight of the solar panelling.<sup>83</sup>

In late 2010, Mr. Sarvinis met with three major roofing manufacturers who also had involvement with the solar panel industry. All three showed initial interest in putting solar panels on the Mall roof but, after crunching numbers, soon returned to say they were not prepared to pay to install a new roof-waterproofing system, install solar panels, and pay rent to Eastwood. All three companies were, however, willing to sell Eastwood a

new roofing system and solar panels for it to install itself. This was a huge financial undertaking (\$4 million to \$5 million) that Mr. Nazarian was not interested in taking on.<sup>84</sup> The solar panel option was off the table, at least at that time. As will be seen, the idea was revived in 2011.

On December 22, 2010, Mr. Sarvinis emailed Bob Nazarian and Levon Nazarian, advising that he did not yet have the necessary information to allow Eastwood to approach the City with a proposal about the proposed parking lot changes. After reporting about the lack of interest from the roofing manufacturers in the solar panel idea, he wrote:

I think we need to discuss how we wish to proceed. I know that your primary objectives were to stop the roof leaks, produce a relatively flat parking area for the food store and give the mall a complete face lift. We need to work through what the most cost effective options are to accomplish this now that the PV system may not materialize. With respect to roof leak, the options are:

1. to put a traditional roofing system and eliminate parking on the roof which will then require us to create additional parking space on the site to meet the parking by-laws
2. to put a traffic bearing waterproofing system on the roof and keep the roof top parking

Either option will cost in the order of \$4 to \$5 [per square foot] for the roofing / waterproofing option but option No. 1 will also have financial implication associated with creating new parking somewhere else on the site.<sup>85</sup>

The roof deck had an approximate area of 120,000 square feet.<sup>86</sup> The proposed cost of either waterproofing system proposed by Mr. Sarvinis was between \$480,000 and \$600,000. Mr. Sarvinis testified that this was more than the Nazarians had anticipated spending.<sup>87</sup> Bob Nazarian testified that he thought that the first option was the right one – that “we had to eliminate the trouble with the roof, once forever, not a patch or not a thin layer and this kind of things. It would not work in this country.”<sup>88</sup>



## Fall 2010: Bob Nazarian continues to believe that the leaks cannot be fixed and cars have to come off the roof

Mr. Sarvinis testified that the Nazarians told him that there were ongoing leaks and “they just couldn’t catch up with fixing them.”\* Bob and Levon Nazarian both admitted before me that that was accurate – as Bob Nazarian testified: “Obviously, obviously.”<sup>89</sup> Levon Nazarian testified that “we couldn’t have a permanent solution to the leaks.”<sup>90</sup>

As I have indicated above, Bob Nazarian testified that he had concluded by the fall of 2008 that the roof could not be fixed in a way that allowed cars to drive on it. He had not changed his mind on that point two years later. Nevertheless, despite many opportunities, he never followed through with his solution of purchasing the land between city hall and the Mall, removing the parking from the roof, and putting a conventional waterproofing system on the roof.

## December 2010: Architect Paul Mitchell is retained to improve the Mall and terminated when his proposal was too costly

Eastwood also hired architect Paul Mitchell, from North Bay, Ontario, at this stage. Levon Nazarian testified that Mr. Mitchell was retained to make the Mall more appealing, to attempt to obtain a grant from the City under a program called the Community Improvement Plan for those improvements, and to consider putting another elevator in the Mall.<sup>91</sup> On December 9, 2010, Levon Nazarian emailed both Mr. Mitchell and Mr. Sarvinis, explaining the intended role of each and asking them to work together “so we may seek the utmost compensation from the City of Elliot Lake.”<sup>92</sup>

On December 13, 2010, Mr. Mitchell emailed Levon Nazarian, advising him that he had spoken to Mr. Sarvinis to discuss their combined efforts. He suggested that both he and Mr. Sarvinis needed to gather “a detailed understanding of what is there and design of a series of exterior, interior and parking lot improvements.” He then proposed that, because the work in the early phases could not be completely defined, he and his staff work on an hourly fee basis. He estimated the number of hours for him and his staff on a spreadsheet that he enclosed. The total fees estimated by him were \$98,979.<sup>93</sup> Both Mr. Mitchell and Bob Nazarian signed the agreement he attached which stated that Eastwood would pay to Mr. Mitchell’s firm his fees and expenses as per the estimate.<sup>94</sup>

On January 12, 2011, Levon Nazarian emailed Mr. Mitchell, writing:

I have reviewed your quote, as you advised, I believe to begin with, it would be wise to take your advise [*sic*] and to move forward on an hourly basis, mainly because we still do not know as to what is feasible and whatnot. Also, Bob has advised me that he would like you to go ahead and make the formal application to the City of Elliot Lake for the painting of the mall.<sup>95</sup>

Levon Nazarian testified that, although Mr. Mitchell had come up with an elaborate plan to renovate the Mall by adding glass panelling and other features that would have cost more than \$3 million, this was not what he and his father wanted. He testified that they wanted “just a minor facelift of the Mall, basically spruce it up, whether it’s landscaping, painting some exterior features, some interior features.”<sup>96</sup> It was Levon Nazarian’s evidence that, when he wrote the email, he told Mr. Mitchell he wanted to reduce the scope of the proposed changes and apply to the City of Elliot Lake only for reimbursement for painting the Mall.<sup>97</sup>

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\* Sarvinis testimony, June 5, 2013, pp. 12891–2. See also Levon Nazarian testimony, July 16, 2013, pp. 16554–64; Exhibit 733. Eastwood was also initially looking at improving the layout of the ground level parking lot, which had apparently become a trip-and-fall hazard. This potential improvement appears to have quickly fallen by the wayside.

## January 2011: Eastwood tells Foodland of changes to come, including the elimination or reduction of rooftop parking when no such decisions had been made

On January 19, 2011, Levon Nazarian emailed Pierre Vaillancourt, the owner of Foodland, writing:

We are still moving forward to revitalize the mall, our three main priorities at the moment are:

1. Painting the Entire Façade of the Mall
2. Flattening the ground level of the parking lot and increase the number of stalls
3. Making 50% (if not all of it) a conventional roof and eliminate the leaks once and for all.
4. Revitalizing the entire exterior façade of the mall (other than painting).
5. Introduce more signage (elegant, illuminating, eye catching).

...

I have just spoken to Paul Mitchell from Mitchell Architects from North Bay. He has been working steadily on the new design concepts he proposes for the mall. I have yet to see them, but he assures me that I will be very impressed. I'm hoping to have their proposal, cost and outline within two weeks. Once I receive them, I will send you a copy.

Philip Sarvinis from RJC Engineering is spearheading the flattening of the land. He is currently in the works to maximize the entire ground level parking to balance off the elimination of the roof top parking. He will also update me more within the next two weeks.<sup>98</sup>

Levon Nazarian testified that, just one week before he sent this email, he had told Mr. Mitchell to stop working on anything other than painting the Mall. He could not explain why, given those instructions, he wrote to Mr. Vaillancourt and told him that Mr. Mitchell was "working steadily on the new design concepts" and that he was hoping to have their proposal, cost, and outline within two weeks. He suggested that perhaps Mr. Mitchell proposed something elaborate in the intervening seven days, but he had no memory of that occurring.<sup>99</sup> In fact, a subsequent email from Mr. Mitchell indicated that he presented design drawings to Levon Nazarian on February 4, 2011, and Levon Nazarian told him that the proposed design was not affordable.<sup>100</sup> Perhaps Levon Nazarian was mistaken when he testified before me that he had limited Mr. Mitchell's involvement on January 12. He certainly had not decided by January 19 to revitalize the entire exterior façade of the Mall and introduce elegant, illuminating, and eye-catching signage.

The January 19 email also suggests that a decision had been made to flatten the ground level parking lot, increase the number of parking stalls, and remove at least half the parking from the roof deck. In fact, no such decisions had yet been made, because the Nazarians were still waiting to hear from Mr. Sarvinis about the cost of those projects. As events would show, none of those things were done. Once again, false promises were made to a tenant.

Bob Nazarian testified that he signed Mr. Mitchell's contract but then decided that what Mr. Mitchell was proposing was too expensive. So "[w]e decide to pay him and eliminate his participation."<sup>101</sup> That payment was not made until after Mr. Mitchell wrote on March 17, 2011, demanding payment in accordance with the contract.<sup>102</sup>

## February 2011: Mr. Sarvinis's detailed costing gives Eastwood a number of options including a thin membrane or eliminating rooftop parking – Eastwood does none of them

On February 15, 2011, Mr. Sarvinis wrote to Eastwood with a more detailed proposal and pricing. He first advised Eastwood that, after having reviewed the designed capacity of the roof structure, he had determined that the roof could not support the loading created by an asphaltic waterproofing system. He wrote, however, “if the PV [photo-voltaic, or solar] panel option does not materialize something will need to be done with the roof to stop the leaks as a minimum and then if possible add parking.” He proposed a number of options, some of which could be combined, depending on the number of parking spaces needed:

- (a) installing a “thin-set” traffic deck coating over the entire roof deck, allowing parking over the entire area, at a cost of \$850,000 to \$950,000; the system would not be resilient to snowplough damage, and the ploughs would have to have rubber-tipped blades to minimize the damage; it would require additional maintenance each year to repair the damage;
- (b) installing a thin-set coating over only the area around the Hotel and office building for 66 cars, covering the rest of the roof in a traditional membrane that could not be driven on, at a cost of \$600,000 to \$700,000 plus an additional \$1.5 million to \$1.7 million to create a new parking lot with approximately 174 parking spots on the land proposed to be purchased from the City; and
- (c) modifying the parking lot along Ontario Street east of the Mall, making it flat, at a cost of \$1.4 million to \$1.6 million.<sup>103</sup>

The roof provided approximately 334 parking spaces in total. As I indicated earlier, Eastwood needed to make up at least some portion of that to comply with zoning by-laws. It appears from the evidence that option (b) above would have satisfied those by-law requirements.<sup>104</sup>

Bob and Levon Nazarian testified that, by late February, Eastwood had decided that the levelling of the Ontario Avenue parking lot was cost prohibitive.<sup>105</sup> This decision was confirmed in an email on February 22, 2011.<sup>106</sup> Therefore, if Mr. Sarvinis's recommendations were to be followed, Eastwood had two options: either put a thin membrane on the entire roof, or put it on only part of the roof and build a new parking lot on land to be purchased from the City.

Levon Nazarian testified that he and his father rejected the first option because of Mr. Sarvinis's description of its inherent problems. He testified:

[O]ne of the statements that he made to me is: We can do the thin layer parking – a thin layer waterproof membrane system, but I will not guarantee it.

And for us, I mean, as a prudent landlord, you are not going to venture off into a million dollar investment that's not going to be guaranteed. It just doesn't make sense.

... He said in order to minimize the damage, he would suggest a rubberized blade on the snow plow, but even then he advised that it is still problematic, it will still require ongoing maintenance, and it will not be a permanent solution or a perfect fix.

Obviously we already – we had already known this. So we were going forward with a new parking – parking lot structure.<sup>107</sup>



This decision was consistent with what Bob Nazarian testified had been his belief since at least 2008 – that the rooftop parking had to be removed. For that to happen with the Mall remaining open, Eastwood would have to buy land from the City and construct a parking lot there. Despite this long-professed conclusion, however, the project did not proceed. Bob Nazarian maintained his usual pattern of balking at the prospect of investing significant amounts of money in the Mall and properly fixing the roof. He was not willing to pay for the necessary renovations using his own assets. The only source of financing being explored at the time was the securing of a BDC loan, which I discuss below.<sup>108</sup>

In keeping with Mr. Nazarian's pattern of behaviour with hired professionals, Mr. Sarvinis's relationship with Eastwood soon soured. He did not pay Mr. Sarvinis's account in the amount of \$23,825.34.<sup>109</sup> On March 17, 2011, Read Jones Christoffersen registered a construction lien on the Algo Mall property in that amount.<sup>110</sup> Eastwood and Mr. Sarvinis eventually reached an agreement on payment (at a lesser amount than originally requested) and the lien was lifted. However, the professional relationship was temporarily suspended.<sup>111</sup>

I think it important to recall that, after the collapse, NORR found that the Algo Mall roof was in critical condition at this point in time and had been for years. If a proper structural condition assessment had been carried out in 2011 by Mr. Sarvinis or someone else, Eastwood would likely have learned that, for the building to be capable of bearing even its designed loads, let alone additional load, much of the steel throughout the structure needed retrofitting and reinforcement, in addition to the application of a waterproofing membrane. (See chapter 3, Causes of the Collapse.) Mr. Sarvinis was not aware of these deeper structural issues<sup>112</sup> and told the Commission that, had he been aware of the past engineering reports and the true history of the leaks at the Mall, he would not have made any of the proposals he did without first doing a complete structural review.<sup>113</sup>

## December 2010–March 2011: Eastwood moves slowly on buying the City land for a new parking lot

A new City Council was sworn in on December 3, 2010. On December 7, 2010, while Mr. Sarvinis was preparing his preliminary report, Mr. Fabris wrote to Daniel Gagnon, the chief administrative officer, offering to purchase the land for the new parking lot for \$10,000.<sup>114</sup> Although the letter stated: "We had offered the prior CAO as well as counsel, \$10,000 for the attached land; this offer still stands," the previous offer, made more than a year earlier on November 18, 2009, was to pay \$15,000.<sup>115</sup>

On the same day, there was a meeting at city hall between Mr. Mitchell, Alex Sennett (who worked for the Nazarians on various projects), Levon Nazarian, Mr. Gagnon, and Mr. deBortoli (who had become the City's chief operating officer in October 2010, directly supervising Mr. Ewald, the chief building officer, and would become the chief administrative officer in March 2011). Notes made by Mr. deBortoli during the meeting indicate that Levon Nazarian wanted to "break down barriers and restore a better relationship between the Mall and the community." Levon Nazarian said that Eastwood was planning to revitalize the Mall both inside and out, with plans to level off the entire front façade and put solar panels on 50,000 square feet of the roof, with the remainder of the roof being used for parking. They also discussed the Community Improvement Program from which Eastwood hoped to get a grant to improve the Mall. Mr. deBortoli did not recall the subject of the roof parking being brought up during the meeting.<sup>116</sup>

I saw no evidence of a response to the offer to purchase the land for \$10,000 over the next three months until, on March 8, 2011, Mayor Hamilton ran into Bob Nazarian when walking through the Mall. Mr. Nazarian told the mayor that he was still interested in acquiring land from the City for parking. Mayor Hamilton told Mr. Nazarian to have his lawyer call Mr. deBortoli, and sent Mr. deBortoli, Ms. Sprague, and Mr. Ewald an email letting them know he had done so. At the time, Mayor Hamilton understood that the potential land purchase related to Eastwood's attempts to deal with the leaks at the Mall.<sup>117</sup>

Mr. deBortoli knew about the leaks at the Mall. In his earlier position as director of operations, he was part of the City's senior management team when it was dealing with the problems at the Library and the possibility of renewing the lease in 2008.<sup>118</sup> He had regularly attended City Council meetings while he held that position.<sup>119</sup> In addition, over the previous five months, he had met regularly with Mr. Ewald to learn more about the Building Department.<sup>120</sup> During those meetings, he was advised of the ongoing problem with leaks at the Algo Mall. He was aware of the 2006 Notice of Violation issued to Eastwood, but not the fact that no one had followed up on it. He also learned of the 2009 Order to Remedy, but again not the fact that it had been rescinded. In addition, he was aware of the 2009 M.R. Wright engineering report, but he did not see it himself.<sup>121</sup>

On March 14, 2011, Mr. Fabris wrote to Mr. deBortoli asking about the status of the offer made on December 7, 2010, saying that his client was anxious to purchase.<sup>122</sup> Mr. deBortoli made a note on the document asking City staff to inquire about the offer, whether there were previous offers, and for how much. He raised the question of whether the matter should be brought to council's attention.<sup>123</sup> At the time, he was unaware that Eastwood had made a previous offer for the land that had been rejected by the City because the price offered was too low.<sup>124</sup>

Mr. deBortoli wrote to Mr. Fabris on March 24, 2011, after having reviewed the file related to the sale of the City land, including the earlier indication to Mr. Fabris that the City had obtained an appraisal of the land's value as being \$55,000. Again, the City informed Eastwood that the purchase price needed to reflect the fair market value of the property to comply with the *Municipal Act*:\*

Accordingly, should your client be willing to submit an offer to purchase which more accurately reflects fair market value, I would then be in a position to present that offer to Council for consideration.<sup>125</sup>

By the time that letter was sent, the relationship between Eastwood and Mr. Sarvinis, who would have to be involved if the new parking lot was going to be constructed, had come to an end. Mr. Nazarian had not paid his bill, and Mr. Sarvinis had filed a construction lien a week earlier. If Eastwood wanted to proceed with the plan to fix the leaks by moving the cars off the roof and applying a new conventional roof, it was in no hurry to do so.

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\* The *Municipal Act*, 2001, SO 2001, c 25, s 106(1), provides that "a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose." Sub-section 106(2) provides, among other things, that a municipality shall not grant assistance by leasing or selling property at below fair market value.

## October 2010–April 2011: Eastwood tries to refinance the Mall but encounters strict conditions, including a potential structural engineering report

As I have discussed earlier, Eastwood was hoping to refinance, discharge its current mortgage being administered by the Royal Bank of Canada, and borrow from a new lender. Both Levon and Bob Nazarian testified that the intent of this new financing was to acquire funds to properly fix the roof.<sup>126</sup>

New financing was sought from the Business Development Bank of Canada (BDC) in the fall of 2010. On October 22, 2010, Ara Movsessian, a senior account manager at the BDC, emailed Levon Nazarian with a list of information he needed, including an appraisal, financial information, a quote for the renovation work proposed, the amount requested and the exact use to which it would be put, and proof of an agreement with the Royal Bank to discharge the prior mortgage.<sup>127</sup> Bob Nazarian testified that this marked the start of his attempt to get a loan from the BDC.<sup>128</sup> One week later, on October 29, Eastwood's accountant, Mr. Hurmizi, sent an email to Levon Nazarian, writing: "Here is the f.s. [financial statement] ... Please review it before you release. Because it is going to a bank I can't play too much."<sup>129</sup>

On March 21, 2011, the BDC, after reviewing preliminary material provided in support of financing, sent a discussion paper to Eastwood in which it contemplated a \$5 million loan, with \$3.35 million to pay off the existing mortgage and the other \$1.65 million to pay for "Parking Lot Paving & Building Exterior Improvements." However, before actually granting the loan, the Business Development Bank needed an appraisal to confirm the value of the property was \$8 million or more, an environmental site assessment, and Eastwood's financial statements for 2010. The document also said that a "structural report may be required (to be determined in the course of due diligence)."<sup>130</sup>

The BDC sent another letter on April 25, 2011, reducing to \$3.3 million the amount it was willing to consider lending. Bob Nazarian testified that this significant decrease was a result of the lender learning about the Bank of Nova Scotia leaving the Mall.<sup>131</sup> (I am not convinced that this was the reason. Although the bank had been considering leaving because of the leaks since 2009, at least internally,<sup>132</sup> it did not decide to leave until later in 2011 and, as I describe below, was still attempting to facilitate a resolution of the leaks in June 2011.) The new arrangement under consideration contemplated \$3.713 million being available to Eastwood (\$3.3 million from the new mortgage loan, \$300,000 by the release by the Royal Bank (once that mortgage was paid off) of approximately that amount held in a reserve fund, and \$113,000 of investment by Bob Nazarian himself). Of this money, \$3.313 million would then have to be used to pay off the mortgage administered by the Royal Bank, \$345,000 to "flatten / service / prepare" the new parking lot, and \$55,000 to purchase the adjacent land from the City.<sup>133</sup> The loan arrangement therefore contemplated Eastwood paying the City \$55,000, exactly what it had asked for and Eastwood never offered. The conditions remained the same as in the letter of March 21, although the appraisal required was reduced to \$5.077 million, 65 percent of the reduced loan amount.<sup>134</sup>

I note that \$345,000, the amount contemplated by the loan discussion document to be used to "flatten / service / prepare" the new parking lot, was nowhere near the amount of \$1.5 million to \$1.7 million estimated by Mr. Sarvinis in February as the cost of creating the new parking lot, let alone the additional amount of \$600,000 to \$700,000 he had estimated would be required to put a membrane on the roof.



## Spring 2011: Eastwood continues to try to sell the Mall, without success

### Offers made in early 2011, but none concluded

On February 3, 2011, Eastwood entered into an agreement to sell the Mall for \$7.6 million to Wilsondale Assets Management Inc.<sup>135</sup> It was to close on March 31, 2011, and contained a clause allowing the purchaser to terminate the agreement if it was not satisfied with information obtained during a due diligence period of 45 days. As part of that due diligence, the purchaser obtained an appraisal of the property that valued it at \$6.4 million.<sup>136</sup> The appraisal noted that the parking deck was subject to leaks and stated that the Mall manager had indicated that Eastwood was proposing to eliminate the upper deck parking. The appraisal was based on an assumption the leaks would be fixed without relocation of the upper deck parking.<sup>137</sup> Levon Nazarian testified that the deal did not close because, after the due diligence investigation, the purchaser wanted to lower the price. It was his evidence that a number of other agreements were entered into, at prices between \$5 million and \$5.9 million, but none of them closed because the purchaser wanted to reduce the price further.<sup>138</sup>

On March 7, 2011, Eastwood received an offer of \$9 million from Morley Beallor, in trust.<sup>139</sup> It does not appear to have been accepted, perhaps because the Wilsondale Assets Management agreement was alive at the time. Levon Nazarian could not recall the details of this offer.<sup>140</sup>

On March 15, 2011, Bremont Acquisitions Corporation offered \$8.9 million.<sup>141</sup> It was not accepted. Levon Nazarian could not recall the details in respect of this offer.<sup>142</sup>

**On February 3, 2011, Eastwood entered into an agreement to sell the Mall for \$7.6 million to Wilsondale Assets Management Inc. It was to close on March 31, 2011, and contained a clause allowing the purchaser to terminate the agreement if it was not satisfied with information obtained during a due diligence period of 45 days.**

### May 2011: Potential purchase by McCowan and Associates falls through

What appeared to be a serious potential offer came from McCowan and Associates, a real estate development company in Barrie. Ron McCowan, the founder and sole owner of McCowan and Associates, has been in the real estate business for many years. He specializes in purchasing commercial real estate assets in secondary markets, typically outside the Greater Toronto Area. He estimated that his business's real estate portfolio had a value in excess of \$600 million. His business model was to buy properties that needed fixing up and repositioning in the marketplace, and do the necessary work to increase their value.<sup>143</sup>

Mr. McCowan first looked at the Algo Centre in 2009. Based on the net income indicated in the sales materials, the property had a value of around \$12 million or \$13 million, but was being offered for \$10 million. He considered it a good deal.<sup>144</sup> He testified that he signed an offer to purchase for that price<sup>145</sup> and arranged to meet the Nazarians to finalize the deal, on the understanding that Eastwood had agreed to the price. He testified that at that meeting Bob Nazarian surprised him by increasing the price to \$10.5 million. He left the meeting immediately because he objected to this way of doing business.<sup>146</sup>

Bob Nazarian's evidence was different. He testified that he never thought that Mr. McCowan's \$10 million offer was *bona fide*. It was not accompanied by a deposit, and it proposed to pay the \$10 million purchase price by having Mr. McCowan's company assume the existing first mortgage (which then amounted to \$3,714,870), and transferring to Eastwood Mr. McCowan's company's interest in a mortgage on another property which had a face value of \$6.5 million. In addition, on closing, Eastwood was to pay to Mr. McCowan's company \$214,870 in cash.<sup>147</sup> It was effectively a swap of Eastwood's equity in the Mall for Mr. McCowan's company's rights in the mortgage on the other property, with a cash payment from the seller to the purchaser to equalize the two interests.<sup>148</sup>

Bob Nazarian testified that he never agreed to this proposal, and, although he recalled the meeting, his evidence was that he asked only that Mr. McCowan provide a deposit, at which point Mr. McCowan walked out.<sup>149</sup> Levon Nazarian's evidence was to the same effect as his father's, although he gave more details – that Bob Nazarian had asked for a deposit of \$500,000, to be kept by Eastwood on closing, because he believed that the land securing Mr. McCowan's company's mortgage was not worth \$6.5 million. The effect of that, if accepted, would have been to have money being paid to Eastwood by the purchaser – something that may well have been understood by Mr. McCowan as an increase in price.<sup>150</sup> Neither Bob nor Levon Nazarian explained why he thought the mortgage was not worth \$6.5 million.

Mr. McCowan did not look again at purchasing the Algo Centre until May 2011. He testified that he worked initially through an intermediary named Tom Kovacevic, a real estate developer. Mr. Kovacevic had come to him, suggesting that he could negotiate with the Nazarians and get a deal done on Mr. McCowan's behalf. Mr. McCowan was not interested in working directly with the Nazarians because of the way he had been treated in 2009. It was his evidence that Mr. Kovacevic was to make \$100,000 by purchasing the property and immediately flipping it to Mr. McCowan's company.<sup>151</sup>

Mr. McCowan testified that he visited the Mall on three occasions, although he could not recall exactly when. He observed water stains indicating the roof leaked, along with missing ceiling tiles. He went onto the parking deck and observed that work was being done there. He also saw buckets in Zellers and noticed vacancies. These observations did not bother him, however, because most of the properties he purchased were in need of repair and more tenants.<sup>152</sup>

On May 9, 2011, Mr. McCowan entered into an agreement to purchase the land from Mr. Kovacevic in trust for \$6.1 million.<sup>153</sup> In order for Mr. Kovacevic to be able to sell it to Mr. McCowan, he would have had to buy it from Eastwood. Mr. McCowan was not sure why this agreement did not come to fruition.<sup>154</sup>

Levon Nazarian testified that on May 6, 2011, an agreement of purchase and sale of the Mall, at a price of \$5.5 million was entered into between Eastwood as vendor and Tom Kovacevic in trust as purchaser. Both Bob Nazarian and Mr. Kovacevic signed it. It was to close on June 30, 2011. Levon Nazarian testified that Eastwood entered into this agreement because it wanted to sell the Mall and Mr. Kovacevic seemed very serious.<sup>155</sup>

The agreement was subject to a condition whereby the buyer had 15 days – until May 21, 2011 – to conduct due diligence inquiries. If he was not satisfied, the agreement became null and void.<sup>156</sup> On May 20, 2011, both parties agreed to an amendment extending the time for due diligence inquiries to May 31, 2011, and the closing date to June 30, 2011.<sup>157</sup> Levon Nazarian testified that it did not close because Mr. Kovacevic “backed off.”<sup>158</sup> Since Mr. Kovacevic did not buy the Mall, he could not sell it to Mr. McCowan.

## May 2011: The City and Mr. Nazarian receive warning of possible structural damage from the leaks

The City's Economic Development Advisory Committee was not a committee of City Council. It was composed of residents of Elliot Lake. It was established by the City to work in collaboration with council and staff to enhance economic development within the community.<sup>159</sup> Bob Nazarian and Mr. deBortoli attended a meeting of the committee on May 11, 2011.<sup>160</sup>

Bob Nazarian spoke directly to Mr. deBortoli outside the meeting about the need to get the parking off the Mall roof. Bob Nazarian testified that he told him "enough is enough" and that they had to take "drastic action" to eliminate parking on the roof of the Mall.<sup>161</sup> Mr. deBortoli could only recall that Mr. Nazarian wanted him to help him purchase the City land for less than the \$55,000 being asked by the City, and that he (Mr. deBortoli) told him of the provisions of the *Municipal Act* which had to be complied with.<sup>162</sup>

The committee's minutes state:

Mr. Nazarian spoke to the committee regarding the current state of the mall. It is not at its best. He is looking for ideas / suggestions to turn the 80 room hotel into an income property. The mall is suffering because of a loss of tenants. He is looking for help and is open to suggestions. He discussed his plans for a new parking lot and possibly purchasing land from the City to facilitate this.

The Chair advised Mr. Nazarian that we are an advisory committee. She then provided him with one of the proposals that was put forward by a member respecting the Algo Mall.<sup>163</sup>

The proposal that was provided to Mr. Nazarian may well have been a report prepared by Keith Moyer, a local citizen, member of the committee, and chair of Seniors' Action Group of Elliot Lake, a Participant at this Inquiry. Mr. Nazarian acknowledged having received a copy of this report, although he thought that he got it a few days after the meeting.<sup>164</sup> Mr. Moyer's report warned of the danger of corrosion caused by the leaks. He wrote:

One major problem that continually repeats itself in the mall is the penetration of water into the areas directly below the roof parking area. Concrete, by nature, is a porous material, into which, water will penetrate. Given the decades of water, mixed with road salt and other contaminants penetrating into the slab, one may have serious concerns as to the continued viability of the reinforcing steel within this slab, thus, possibly, compromising the structural integrity of the structure. Not being an engineer, I have no way of verifying the soundness of the structure, and quite possibly, the owner has undertaken a study by professional engineers already. Having had some experience in similar problems with concrete surfaced parking areas over usable interior spaces, any remediation of a lasting nature will definitely be costly and involved, requiring the exposure of reinforcing steel and repair thereof, usually from the top side and the interior; replacement of concrete chipped away to expose the steel; and, installation of a rubberized membrane, covered by a layer of asphalt paving, to effect a permanent fix. The sealing of expansion joints and cracks has, in my experience, never been a lasting solution. Having said that, I stress, I am not a professional engineer, and any lasting solution should come from such a qualified company or individual.

I can say, with some confidence, that such an undertaking could be cost prohibitive for the owner, and, may not be fully recoverable for many years to come.<sup>165</sup>

Bob Nazarian told the Commission that he did not agree with Mr. Moyer's assessment. He did not have any doubts about the structural integrity of the building because, at this point in time, he had the 2009 M.R. Wright engineering report which said the building was sound "and we should be resting comfortable."<sup>166</sup> Bob Nazarian testified that he dismissed Mr. Moyer's concerns as being an "idea from a citizen."<sup>167</sup>



## May and June 2011: Mr. Sarvinis is rehired and solar panels create new potential revenue stream

### Scotiabank threatens to leave, prompting Eastwood to revive Mr. Sarvinis's plans

The relationship with Mr. Sarvinis was revived again in May and June 2011. Eastwood contacted Mr. Sarvinis following discussions with Scotiabank. Levon Nazarian testified that he had learned that the bank had purchased land elsewhere in Elliot Lake to construct a new branch and move out of the Mall. At a meeting Scotiabank executives told him that the bank was willing to stay in the Mall provided a new lease allowed it to leave if the leaks continued. Levon Nazarian told them that Eastwood was prepared to get new financing on the Mall and was "going ahead to build a new parking structure and to eliminate the rooftop parking." He showed them the drawings Mr. Sarvinis had prepared. Levon Nazarian and Bob Nazarian both testified, and Mr. Sarvinis confirmed, that Scotiabank was willing to consider staying in the Mall if RJC was involved in fixing the leaks because the bank trusted that firm.<sup>168</sup> Mr. Sarvinis was willing to consider returning to assist Eastwood, despite the history, out of a sense of obligation to Scotiabank, an important RJC client.<sup>169</sup>

Mr. Sarvinis met with Bob Nazarian and Levon Nazarian on June 3, 2011. They told him that they needed a letter from him to show Scotiabank stating that they were going to waterproof the roof. He agreed and on June 8 gave them a letter which stated:

[I]t is our understanding that the Ownership of the Algo Centre Shopping Mall has decided to eliminate the majority of the rooftop parking at the site and waterproof the roof structure to eliminate the existing leakage problem and protect the building for the very long term.

In areas where the parking is to remain; namely two rows around the tower above the mall, the waterproofing system will be a very heavy duty thin set urethane traffic deck coating, which will protect the building against future moisture and chloride ingress in these areas. It is our understanding that snow removal in this area will be by means of hand to minimize damage to the waterproofing, and localized repairs will be undertaken on an as needed basis to ensure the integrity of the system is maintained over its full 15 to 18 year service life.

In areas where the parking is going to be eliminated from the roof of the mall (i.e. south and east legs of the roof), the roof structure will be waterproofed with a traditional roofing system (i.e. EPDM or TPO Fully Adhered System) to stop the current leaks and protect the building from future leaks. The effective service life of a roofing system of this type is typically 25 to 30 years, provided routine maintenance of the system is continually performed.

Unlike past repair programs performed on the roof structure, the proposed retrofit work noted above will involve coating the roof with an impervious membrane system, and not simply sealing the leaking cracks. With our involvement during the design and construction review phases of the project, Read Jones Christoffersen is confident the above action plan will protect the roof of the building for the long term and eliminate the leaks through the existing roof structure.<sup>170</sup>

This letter was then sent the same day, June 8, by Levon Nazarian to the Bank of Nova Scotia, attached to an email that stated: "As per our discussion, I have attached the certification from RJC regarding the roof retrofit for the mall, as well as the Amending Lease Proposal."<sup>171</sup> As Bob Nazarian admitted, the letter was sent to the bank so that it would be convinced that he was going to waterproof the roof and RJC was going to be involved.<sup>172</sup>

The RJC letter followed by a few weeks a letter which Mr. Fabris had sent to Scotiabank on May 20, 2011, in which he wrote:

I can advise you that Mr. Nazarian is in the process of remortgaging procedures and upon receipt of funding; there are substantial renovations to take place at the mall.

All this work, including repairs to the roof and lighting, will be commenced once funding is received and the ground thaws sufficiently.<sup>173</sup>

It was misleading of Levon Nazarian to send the “certification” from Mr. Sarvinis to the bank. Eastwood had not “decided” to do all the things set out in the letter. As Bob Nazarian admitted in his testimony before me, he had no contracts in place to do the work. He did not even have quotes from interested contractors. If the rooftop parking was eliminated, it would have to be replaced with new parking on the City land. Eastwood had not yet reached an agreement to buy that land – it had not even responded to Mr. deBortoli’s last letter of March 24, 2011. Eastwood was not prepared to do any of these things without financing, which it did not have.<sup>174</sup> Furthermore, as I explain below, Eastwood had not yet agreed on payment for the work with RJC, and so could not be sure that the firm would be involved in the repair work.

It was similarly misleading for Mr. Fabris to send the letter of May 20 to the bank. It left the impression that financing was imminent and that the work was ready to proceed. Mr. Fabris admitted that he did not believe, at the time he sent the letter, that these plans would proceed unless there was “some major refinancing.”<sup>175</sup> As I have indicated above, the last loan proposal from the BDC would have advanced only enough funds to pay off the existing mortgage loan being administered by the Royal Bank – with all other funds to do any work having to come from other sources, including cash from Bob Nazarian.

Once again, Eastwood was willing to make misleading statements about its plans to fix the leaks to placate tenants and preserve its own financial interests.

## New opportunities for revenue from solar panels on the roof

Mr. Sarvinis told Eastwood about a California company called Solar Energy Hub looking to come to Ontario to take advantage of the Ontario government program that purchased solar power at a premium price.<sup>176</sup> He again suggested installing the thin traffic-bearing waterproofing membrane around the Hotel, coupled with the renewed possibility of solar panels on the rest of the roof and the creation of the 174-stall parking on the City land.<sup>177</sup> On June 8, 2011, Mr. Sarvinis wrote a formal letter to Bob Nazarian outlining the services he proposed to provide and his anticipated fees, which amounted to a total of \$125,500 plus anticipated disbursements of \$35,000. He described the project, for which RJC would provide most engineering services and act as the prime consultant, as follows:

1. Installation of a new roofing system complete with solar panels on the south and east legs of the roof decks.
2. Repairing and waterproofing the structure with a thin set traffic bearing waterproofing membrane in the area around the commercial building and hotel, which is to remain as a parking area.
3. Construction of a new 174 car parking lot to the northwest of the Shopping Centre, complete with lighting and drainage system.
4. Provision of structural and building envelope engineering services for the re-construction of two main entrance-ways to the mall and the enclosure of the ground floor sidewalk on the east side of the building once the sidewalk slope is revised. It is our understanding that Yorkdale Group will retain the architect and other engineering consultants for this portion of the project to provide design input.<sup>178</sup>

Although Bob Nazarian agreed to the services proposed, he did not agree on the price. He signed the proposal after crossing out the portion dealing with fees.<sup>179</sup> On June 13, Mr. Sarvinis presented a revised proposal, eliminating the portion of the project dealing with the reconstruction of the Mall entrance and reducing the proposed fees to \$102,000 and disbursements of \$24,000.<sup>180</sup> After further discussion, a third proposal was sent on June 20, 2011, which broke the proposed work into two parts – one for waterproofing the roof and the other for constructing the new parking lot. Bob Nazarian had decided to delay the work on the parking lot and tell Mr. Sarvinis he was going to proceed only with the roof work – including the installation of the revenue-producing solar panels – at that time. As Mr. Sarvinis wrote in that letter,

[i]t is our understanding that the acquisition of the neighbouring property to construct the new on-grade parking lot ... may take some time, and therefore may not be able to be completed simultaneously with the other two projects ... It is further our understanding that this retrofit project will have to be completed in two phases, with Phase One being work on the roof of the building ... and Phase Two being construction of new parking lot.<sup>181</sup>

On June 17, 2011, Bob Nazarian and Solar Energy Hub's representative, Jim Randolph, signed a letter of intent in which they agreed to "enter into good faith negotiations" to achieve an agreement that would provide that Solar Energy Hub would take a 20-year lease of approximately 75,000 square feet of the roof deck and pay rent of 45 cents per square foot. In addition, the American company would install a new roof cover with a 30-year dry roof warranty on the portion of the roof deck used by its solar equipment.<sup>182</sup> As Bob Nazarian testified, this was a great opportunity for Eastwood – the roof would be fixed at no cost and would become a revenue source.<sup>183</sup>

This project could not proceed unless Eastwood purchased the adjacent land from the City and built a parking lot on it. As I will explain below, by the fall of 2011, it became apparent that it would not proceed.

## **Foodland is misled about Eastwood's plans to fix the leaks and build the new parking lot**

On July 8, 2001, Mr. Vaillancourt emailed Levon Nazarian, writing:

Regarding the roof-top parking ... I trust that you won't be closing that off until such time as the back parking lot is ready for consumers??? Also, have you completed the deal with the City regarding the purchase.<sup>184</sup>

Levon responded the same day:

We are in the process of buying the land from the City, however, from what I've been told, we have been going through processes and obstacles that have not been very unproductive or inefficient [*sic*] in terms of timing from the City's end ... I hope we can finalize soon, because we do not want to start construction in the winter.

In regards to the construction process, from my understanding, everything will be done at once, however, we will not jeopardize the mall parking. Will we [*sic*] start blocking and constructing in places where cars will still have access to parking on the roof ...<sup>185</sup>

Levon Nazarian testified that this email was accurate in its suggestion that the failure to purchase the land was the City's fault.<sup>186</sup> I do not accept that. The City had been straightforward with Eastwood since the subject came up. It agreed to sell the land for a price that could be defended on a fair market value basis, in accordance with its policies and the requirements of the *Municipal Act*. Eastwood had let the matter drag on for three years, fussing over a relatively insignificant amount in a project that would cost more than \$1 million to complete.



When asked whether his statement in the email that “everything will be done at once” was accurate, Levon Nazarian initially testified that it was, because “our intent was to do it all at once.” He admitted on further examination, however, that, by the time this email was sent, Eastwood had agreed with Mr. Sarvinis that the work would proceed in two parts, with only the rooftop work – which would be done at very little cost to Eastwood – proceeding first. He testified: “I don’t think that was willingly done false, sir, but it could have been a mistake on my part.”<sup>187</sup> This email was misleading; it was evidently intended to mollify Mr. Vaillancourt into believing that his concerns were being met.

## **Summer 2011: Eastwood continues to try to convince the City to sell the land for parking at less than market value; City warned again of structural damage and does nothing**

### **Mall manager states that rooftop parking has to end**

In May 2011, Eastwood hired Rhonda Bear as the new Mall manager. She remained in that position until the collapse. She had no prior experience managing a mall; her background was in communications and design, with some additional course work in business marketing and management.<sup>188</sup> She was given the task of attempting to reach an agreement with the City to purchase the land.<sup>189</sup>

On June 29, 2011, Ms. Bear wrote to City Council and the By-law and Planning Committee about Eastwood’s proposal to expand the Algo Mall’s parking facilities. She offered to have Eastwood pay \$20,000 for the land and, in addition, provide the City with exclusive use of four parking slots that she valued at \$5,000 each. She wrote:

In order to fix the roof we need to end the parking / driving on its upper level, which requires us to seek alternative land for the purpose of expanding our parking.<sup>190</sup>

This letter was received by Mayor Hamilton, the entire City Council, Mr. deBortoli, Ms. Sprague, and the By-law and Planning Committee.<sup>191</sup>

Mayor Hamilton testified he was not surprised to read that parking on the roof needed to be eliminated in order to fix the roof. He said he was concerned about the leaks at the Mall at this point in time, but admitted the City did not do anything itself to address the problem.<sup>192</sup> Ms. Sprague’s reaction to the letter was that the \$20,000 offer was still well below market value. She was not sure what happened to the letter. No evidence was presented to indicate that it was sent to the By-law and Planning Committee, as was done with other such letters.<sup>193</sup>

Mr. deBortoli was asked why he did not direct the letter to Mr. Ewald’s attention to determine if there was a problem that needed some action, since Ms. Bear was advising the City and council that the problem with the leaks was so bad that they had to get the cars off the roof, and

- he knew the leaks had been a problem for years and years;
- he knew the leaks had caused significant problems for the Library;
- he knew that the chief building official had issued at least one, if not two, orders to fix the leaks;
- Ms. Bear was acknowledging that the leaks were still not fixed;
- Eastwood had been talking about buying the land for three years and council had approved its sale at market value in 2009 yet was still attempting to bargain about the price; and
- Bob Nazarian had a history of making promises and not fulfilling them.<sup>194</sup>

Mr. deBortoli's only answer was:

We were looking at ways and means to assist the Mall. They had come to us again with another request to entertain their offer to purchase on the property, and I simply directed this towards the mechanism I felt would best meet their needs.<sup>195</sup>

On July 15, 2011, Ms. Bear wrote to Mr. Hamilton, Ms. Sprague, and Mr. deBortoli, again attaching Mr. Sarvinis's drawings, renewing the offer to purchase at \$20,000 plus the free parking spaces for the City. Ms. Bear wrote: "Being that we are well into July, and will need time to complete plans and construct before the cold hits, we ask for the City to consider an earlier meeting than August?"<sup>196</sup> The implication was that if the City would just sell the land, construction could begin very quickly. That was not so. The financing had not been arranged. The deal with Solar Hub had not been finalized. Contracts had not been entered into. Even after purchase, a site plan agreement would have to be reached with the City. No preparations for that had been made.<sup>197</sup>

### **Mayor Hamilton, council, and the chief building official are told once again that the leaks have caused serious structural problems; again nothing is done**

On July 22, 2011, Ms. Sprague provided a copy of Eastwood's proposal to numerous individuals within the City administration, including Chief Officer and Mr. Ewald.<sup>198</sup> That same day, Ms. Bear wrote to both the By-law and Planning Committee and City Council about the plan to build the new parking lot, again saying: "In order to fix the roof, we need to end the parking / driving on its upper level."<sup>199</sup>

On July 26, 2011, Ms. Sprague, in a report approved by Mr. deBortoli, recommended to the mayor and members of council that they accept Mr. Nazarian's offer to purchase the City land at \$20,000, based on what she understood to be the authority the council had pursuant to the *Municipal Act* to accept a lower price where doing so would be in the interests of the municipality.\* The rationale cited was the improved access for senior citizens that the new parking would create and the environmentally responsible nature of the planned installation of solar panels.<sup>200</sup>

Ms. Sprague stated in this document that the sale of the land was also required in order to create an alternative parking area because "[t]he Mall building is currently facing serious structural problems associated with leakage from the rooftop parking area."<sup>201</sup> She explained that the reference to "serious structural problems" in this report to the mayor and council was actually just a cut and paste of the same language she had used back in her November 30, 2009, report on this same issue.<sup>202</sup>

Mr. Ewald was pressed on why he did not conduct an inspection of the Mall in July 2011 or take other action given that it was clear the leaks at the Mall persisted. Despite being aware of the long history of leaks, the 2006 Notice of Violation that had been ignored, and the 2009 Order to Remedy that had required the leaks to be fixed, Mr. Ewald told the Commission he felt he could not act because he had not received an actual complaint:

Q. Well, by July of 2011, had you concluded that the leaks weren't fixed anymore?

A. They'd started leaking again, yes.

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\* Subsection 106(2) of the *Municipal Act, 2001*, SO 2001, c 25, provides: "[A] municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose." Subsection 106(2) provides, "the municipality shall not grant assistance by, ... (c) ... selling any property of the municipality at below fair market value." Subsection 107(1) provides "... subject to section 106, a municipality may make grants, on such terms as the council considers appropriate, to any person ... for any purpose that the council considers to be in the interests of the municipality" [emphasis added]. Subsection 107(2) provides "the power to make a grant includes the power ... (b) to sell or lease land for nominal consideration." On its face, section 107 does not appear to allow a sale at below fair market value, because the power to do so is expressly indicated to be "subject to section 106" which expressly prohibits such a sale. Although these two sections appear contradictory, it is not necessary for me to decide whether Ms. Sprague's view to the contrary is correct.

- Q. Then why – if you'd come to that conclusion, why did you not conduct an inspection and consider whether to issue an order?
- A. Again, the enforcement of the Property Standards By-law is ... by complaint only, and nobody was complaining.
- Q. And that was enough for you?
- A. Well, you've got to realize I had a lot of other work. I wasn't sitting around waiting for something to happen at the Mall so that I could do something over there.
- I – I had plenty of work to do.<sup>203</sup>

Mr. Ewald saw Ms. Sprague's report and noticed the particular reference to structural problems related to the leaks. He testified that he did not give it much thought, although, in hindsight, it was obviously a correct statement.<sup>204</sup> Although he knew the roof was leaking again, he insisted that he did not know that the roof had serious structural problems, especially given that he'd received an engineering report 18 months before that said the opposite:

Well, in 2011, obviously, I knew that the mall roof was leaking again, at least, periodically. I also knew that they were, again, putting caulking on ... the roof.

Again, this ... business of facing serious structural problems – and obviously, in hindsight, it most definitely was, but I had an engineer's report from less than a year prior ... that said it wasn't.<sup>205</sup>

## City Planning Committee, council, and senior staff are asked by Eastwood to support land sale because it was imperative to eliminate parking on the roof; nothing is done

On August 2, 2011, Ms. Bear presented Eastwood's case for the purchase of the City land to the By-law and Planning Committee. Present were Mayor Hamilton, four councillors, Mr. Ewald, Ms. Sprague, and Mr. deBortoli.<sup>206</sup> In a slide presentation, Ms. Bear described Eastwood's plan to put solar panels on the roof, eliminate most of the parking there, and build the new lot on the City land. The slides included the following information:<sup>207</sup>

- The statement that "[a]fter 30 years, time has taken a toll on the mall's roof. The Problem: Driving on the roof. No material available can handle the weight of vehicles AND continuously seal and protect the roof from the weather." (This slide includes a photograph taken by Ms. Bear in July 2011 (see figure 1.11.2).
- The leaking roof is forcing out tenants. (Ms. Bear in testimony referred to this as "stating the obvious."<sup>208</sup>)



**Figure 1.11.2** Photograph taken by Rhonda Bear in July 2011 showing missing drywall in the ceiling only 20 feet from the eventual collapse

Source Exhibit 155



- It is “imperative to make the decision to eliminate the driving and parking on the roof!”
- “It will be difficult to lease to new tenants when buckets and hoses are located in the entrance ways of our stores and there are holes in our ceiling due to leaks.” This slide includes a picture of a store entrance, with hoses coming down from the roof funnelling water into a bucket; and
- “The entire roof will be waterproofed – a conventional roofing system will be installed and a thin-set traffic bearing waterproofing will be installed on the roof within the area designated for parking. Solar panels are being discussed, but will not be contemplated until a later date.”

According to Mayor Hamilton, no one at this meeting raised the issue of potential structural problems created by the leaks. No one discussed a potential referral of the leakage problem to the chief building official for investigation.<sup>209</sup>

Following this meeting, the By-law and Planning Committee directed City staff to request additional information about timelines for the project, guarantees of construction, and reasons to justify the request for a lowered price. The committee also wanted to be certain that the new parking lot was completed before the old one was closed. Generally, the committee was not in favour of selling the land at the lower price without more information, but nevertheless recommended that the matter be forwarded to the next council meeting for discussion.<sup>210</sup> According to Mr. deBortoli, one of the points of hesitation for the committee was Bob Nazarian’s past history of making promises and not following through.<sup>211</sup>

On August 3, 2011, Mr. Ewald, in his capacity as secretary of the By-law and Planning Committee, wrote to the mayor and council advising them of the committee’s recommendation that the Eastwood proposal be forwarded to council for discussion. Attached to the letter were Ms. Sprague’s report and Ms. Bear’s July 22, 2011, letter.<sup>212</sup> Mr. deBortoli could recall no discussion by councillors of Ms. Sprague’s warning in her report that the Mall was facing serious structural damage because of the rooftop leaking.<sup>213</sup>

On August 5, 2011, the former mayor, Mr. Farkouh, wrote to Mayor Hamilton encouraging him to sell the property to Eastwood:

I encourage you to make a deal with them and find a way to sell it below the appraised value. After all there are no other buyer[s] who would be interested in this property. Another good reason to work with the mall owner is to help them solve the leakage problem and start leasing more property on the second level.

...

I am sure you support this request, now you must ask the administration to find the legal way to do it.

We have precedents for such disposal of land below market value. After all what is market value, a willing buyer and a willing seller.<sup>214</sup>

On August 8, 2011, Ms. Bear appeared before City Council to address the concerns raised by the By-law and Planning Committee. She repeated her slide show presentation.<sup>215</sup> One councillor, Al Collett, did not perceive the concerns raised about the leaks and the need to get parking off of the roof as an indication of a structural problem at the time. Instead, he saw it as a positive indication that there was a plan to fix the leaks. He did not recall any council questions about structural problems at the Mall. His view was that everyone present knew there were leaks but did not think the problem was at a critical stage.<sup>216</sup>

Council's questions focused instead on the timing of construction, specifics of the plan, and where the funds would come from. Council wanted assurance that the parking would not come off the roof until the other parking lot was built (something Ms. Bear could not promise), and also had worries about Eastwood's ability to finance the project. Mr. Collett and others also expressed concerns that Eastwood was simply trying to make money from having solar panels on the roof and was not serious about fixing the leaks. As with the By-law and Planning Committee, members of City Council questioned Bob Nazarian's true intentions.<sup>217</sup>

Mayor Hamilton testified that the presentation to council did not result in a decision. Instead, it was simply a presentation for discussion. He said, "at the end of the discussion, I advised Ms. Bear that we don't negotiate property in the public realm and referred her back to staff, where the matter was at that time."<sup>218</sup>

The attempt to purchase the land for a new parking lot does not appear to have been discussed after the council meeting of August 8, 2011. Other than a quick follow-up email, Eastwood did not contact the City again about this land purchase before the collapse, and the City took no further action as a result.<sup>219</sup>

Eastwood appears to have taken few meaningful steps to proceed with the construction of the new parking lot thereafter. On September 20, 2011, the company received two different proposals for the provision of geotechnical services to understand the nature of the terrain underneath the proposed parking lot. Neither company was retained to do this work. Instead, Eastwood had the Mall manager's husband and Mr. Fabris's son take core samples.<sup>220</sup>

As I explain below, Eastwood was unable to obtain sufficient funding, either from Solar Hub or a new loan, to pay for the new parking lot without a significant injection of Bob Nazarian's personal assets. Bob Nazarian told me, however, that he saw the Algo Mall as a "black hole" and was not willing to risk his own money in an attempt to fix the leaks.<sup>221</sup> It is difficult to avoid the suspicion that this refusal to spend on the Mall was the reason for the lack of continued interest in the land purchase. The result was that nothing changed in the way that the leaks had been dealt with since the Mall was built – the same ineffective practice of caulking and re-caulking continued until the collapse.

**As I explain below, Eastwood was unable to obtain sufficient funding, either from Solar Hub or a new loan, to pay for the new parking lot without a significant injection of Bob Nazarian's personal assets. Bob Nazarian told me, however, that he saw the Algo Mall as a "black hole" and was not willing to risk his own money in an attempt to fix the leaks.**

## **Conclusion: Mr. Ewald's continued lack of action of great concern**

I deliberately repeat and emphasize that I find the City's inaction, and particularly that of Mr. Ewald, to be very disturbing. Although Mr. Ewald had received the 2009 M.R. Wright engineering report, it was deficient on its face, the inspection being limited to certain specific areas in the Mall. Mr. Ewald, Mayor Hamilton, and other City officials knew about the long history of leaks at the Mall and the potential for those leaks to cause structural damage. They knew of former chief administrative official Tom Derreck's apprehension in 2006 about structural damage, the 2006 Notice of Violation which required an engineering report and that the leaks be fixed, and the 2009 Order to Remedy to the same effect. They knew that, despite everything, the leaks had not stopped. They were explicitly told that the Mall had serious structural problems. The owner openly admitted that the situation at the Mall had become desperate. Despite all this accumulated knowledge, and continued lack of action by Eastwood, the City did not use the Property Standards By-law enforcement mechanisms to force Eastwood to act.<sup>222</sup>

## July 2011: The BDC refinancing offer is insufficient to pay for roof repairs and a new parking lot

A formal offer for financing was sent by the Business Development Bank of Canada to Eastwood on July 18, 2011. It proposed a loan of \$3.3 million, all of which would be required to pay off the existing mortgage being administered by the Royal Bank. In addition, Eastwood was required to use the refund of the reserve being held by the Royal Bank (at that time \$266,660) and funds to be invested by Bob Nazarian in the amount of \$471,632 to purchase the adjoining land for \$55,000, make realty improvements in the amount of \$445,000, and pay a GST debt of \$232,292. The financing was subject to numerous conditions, including:

- the provision of quotes or invoices for the improvements, including “all necessary roof repairs and resealing of roof membrane to ensure it is waterproof going forward, and the relocation of the roof-top parking to the ground level” at a cost of \$445,000; and
- the provision of “an Inspection Report, satisfactory to BDC, prepared by an engineering firm approved by BDC confirming that the structure, mechanical and electrical systems and elevators for the buildings ... are sound and in operating order.”<sup>223</sup>

The requirement for an engineering report would lead to Robert Wood being retained again in May 2012, just weeks before the Mall collapse. His report found no structural issues in the Mall. I deal with this report in the following chapter.

As Levon Nazarian admitted, this loan would not have given Eastwood enough money, without a greater investment from Bob Nazarian, to buy the land from the City and build the new parking lot, even if Solar Energy Hub paid to waterproof the roof.<sup>224</sup>

## July–August 2001: Eastwood continues to try to sell the property, to no avail

On July 15, 2011, Eastwood entered into a signed agreement to sell the Mall to Homayon Zehtab for \$7.9 million.<sup>225</sup> On August 2, 2011, a new agreement was entered into, signed by both parties, to sell the Mall for \$5 million with a prospective closing of September 30, 2011. The new agreement provided for the property to be purchased “on an as is, where is, with all faults basis and without representation or warranty of any kind.” It also stated that “the Buyer acknowledges that they each have inspected the respective property and is satisfied with the physical state of such property.”<sup>226</sup> On August 8, 2011, when Eastwood made its presentation to City Council outlining its plans for the Mall, it was party to a binding and firm agreement to sell it. As Levon Nazarian acknowledged in his evidence before me, this was one of the two or three agreements to sell the property that “went firm.”<sup>227</sup>

The transaction did not close. On August 15, 2011, Mr. Zehtab’s lawyer wrote to Eastwood’s lawyer, claiming that the agreement was void because there was no “meeting of the minds” and because of what he claimed to be “false and misleading representations by both the seller and the seller’s agent / broker relating to the substantial divergence on revenues and the cap rate.”\* Litigation resulted.<sup>228</sup>

• • • • •

\* Exhibits 1314 and 1873; Levon Nazarian testimony, July 16, 2013, pp. 16744–9; Bob Nazarian testimony, July 26, 2013, pp. 18501–3. Mr. Zehtab initiated litigation in an attempt to recover the \$50,000 deposit he had provided Eastwood: Exhibits 1315, 5681, and 5695; Levon Nazarian testimony, July 16, 2013, pp. 16751–3.



## August 2011–December 2011: The Solar Energy Hub deal sweetens, then disappears

On August 30, 2011, perhaps because it still did not have sufficient loans available, Eastwood asked Solar Energy Hub whether, in lieu of paying rent for the space on the roof, the company would pay for the construction of the new parking lot. Mr. Sarvinis sent Solar Energy Hub his estimate of costs for the parking lot. The company considered the proposal but rejected it. Jim Randolph, the company's director of sales, wrote back to say that, if the parking issues were becoming problematic for Eastwood, the company "may have to let this project go and consider others that may be more viable. Please advise."<sup>229</sup>

The same day, August 31, 2011, Mr. Sarvinis wrote to Levon Nazarian, advising him that he now estimated the total soft and hard costs of constructing the new parking lot would be between \$1 million and \$1.4 million.<sup>230</sup>

Levon Nazarian came up with a new proposal in late September 2011 to raise the funds to pay for the project. He suggested that Solar Energy Hub make an up-front payment in lieu of paying total rent of \$900,000 over the course of the 20-year lease. He testified that the company was willing to entertain this idea, and agreed, subject to some conditions, to pay \$675,000 immediately in addition to paying for the waterproofing of the deck. This evidence is corroborated by an email from Solar Hub's lawyer to Eastwood's lawyer dated September 29, 2011, attaching a draft lease that had changed the rent to be paid from a monthly sum to a \$675,000 payment on commencement of the lease.<sup>231</sup> Levon Nazarian was extremely happy with this possibility because he saw it as a means to finance the parking construction.<sup>232</sup>

The deal remained uncertain, however. Solar Energy Hub was still waiting for approval from the Ontario Power Authority before being able to do business in Ontario.<sup>233</sup> Eastwood had a possible source of at least partial financing, but now had to wait for the solar company to receive government approval to proceed. The deal was never consummated. On December 15, 2011, Solar Energy Hub emailed Levon Nazarian, advising him that it was still waiting for the Ontario government's decision on changes to the government subsidy program.<sup>234</sup> Levon Nazarian testified that the program came to an end just before the Mall collapsed. As it turned out, Eastwood could not have gone ahead with the Solar Energy Hub proposal.<sup>235</sup>

## October 2011: Mr. Sarvinis ends his relationship with Bob Nazarian

On October 14, 2011, Mr. Sarvinis sent an email to Levon Nazarian, with a copy to Bob Nazarian. He noted that three invoices, the earliest of which had been sent June 30, 2011, remained unpaid, in the total amount of \$20,291. He threatened to place a lien on the property if payment was not received in a week's time.<sup>236</sup> He was eventually paid but, as Bob Nazarian acknowledged, he did no more work for Eastwood and nothing more was done by the Nazarians on the second parking lot thereafter.<sup>237</sup>

## Fall 2011: Mr. McCowan revives his interest in purchasing the Mall

### Signed agreement of purchase and sale to close November 30, 2011

Mr. McCowan testified that on July 26, 2011, he spoke to Jim Davison of the Royal Bank, who had been dealing with Eastwood on the mortgage administered by that bank. Mr. McCowan said that he learned from Mr. Davison that the bank was advising Computershare Trust Company (the actual mortgage holder) to get out of the mortgage because of all the trouble Royal Bank was having with the property – that the Mall was not in good shape and was losing tenants. Mr. McCowan offered to buy the mortgage at a discount, something he occasionally did because it allowed him to profit from the mortgage and, if the owner defaulted, put the property up for sale and profit in that way as well. It would also have given him leverage with Bob Nazarian because he would have been dealing with him as his lender. Mr. McCowan did not ultimately pursue this avenue because Computershare wanted full price for the mortgage and the payment of a penalty.<sup>238</sup>

On October 14, 2011, Mr. McCowan's company entered into an agreement of purchase and sale, signed by him and Bob Nazarian, agreeing to purchase the Mall for \$5.7 million, to close November 30, 2011.<sup>239</sup> Both Levon Nazarian and Mr. McCowan testified that the lower price, compared with the \$10 million he had been willing to consider in 2009, was a reflection, among other things, of the fact that two major tenants (Shoppers and the Bank of Nova Scotia) had moved out in the interim.<sup>240</sup> Mr. McCowan added that he had learned, because he owned other malls that had Zellers stores, that Zellers, which occupied 60,000 square feet, would be leaving as well.<sup>241</sup> Mr. McCowan still saw the purchase as a great opportunity:

It was that good of a deal. I mean, the replacement cost on this mall was 40 million dollars and you are buying it for, you know, 12 or 15 percent replacement cost. It is a good deal.<sup>242</sup>

The closing date for the transaction was extended from November 30 to December 2 because Eastwood was unable to get Computershare to agree to a discharge of its mortgage without payment of a significant penalty of approximately \$450,000. The terms of the mortgage required that this penalty be paid, but the Nazarians were attempting to convince the mortgagee to waive it. Bob Nazarian was not prepared to pay it and reduce his proceeds from the sale from \$5.7 million to \$5.25 million. He attempted to have the fee waived by contacting the Royal Bank directly but was unsuccessful. As a result, the agreement terminated on December 2 when it did not close.<sup>243</sup>

## The evidence appears to support the conclusion that Mr. Wood warned Mr. McCowan that the roof urgently needed critical repairs

During the due diligence process, Mr. McCowan acquired M.R. Wright's October 28, 2009, report on the state of the Mall.<sup>244</sup> Mr. McCowan testified that he looked at the report and quickly concluded that the parking deck was in bad shape. He immediately contacted Mr. Wood by phone and asked him about the roof. Although he could only paraphrase Mr. Wood's words, Mr. McCowan recalled the engineer telling him the roof needed to be fixed immediately as it had been poorly maintained and was being eroded by salt. According to Mr. McCowan, Mr. Wood said words to the effect that, if the roof was not fixed, it was going to fall down. However, what

Mr. McCowan actually understood from the comment was that, if the roof wasn't fixed, it could be a problem.<sup>245</sup> He explained as follows:

Well, when you do a lot of roofs, people use that phrase very loosely, so I didn't mean it to mean that it is going to fall down tomorrow. I didn't interpret it that way ...

So I didn't really take it to mean that it is going to collapse the next day. But it needed to be dealt with in a very short period of time, be it two months, be it three months, be it four months.<sup>246</sup>

Mr. McCowan testified that he then asked Mr. Wood what it would cost to fix the roof and was told that it would cost around \$1.5 million.<sup>247</sup> He also recalled Mr. Wood telling him that he had told the Nazarians that the roof needed to be fixed right away.<sup>248</sup>

Ashley Sherrard, Mr. McCowan's broker, was present in the room during Mr. McCowan's conversation with Mr. Wood. She testified that, after he hung up the phone, he confirmed what she had thought – that there was major damage to the roof. She recalled asking Mr. McCowan after the phone conversation how much the engineer thought it would cost to fix the roof. Mr. McCowan replied that it would be \$1.5 million overall, and that \$500,000 needed to be spent immediately.<sup>249</sup>

Mr. Wood testified three days before Mr. McCowan. He testified that he was not aware of ever having had a conversation with Mr. McCowan about the condition of the Mall and did not actually know who Mr. McCowan was. However, he had a vague recollection about having a conversation with a developer who might have been Mr. McCowan who said he had a copy of the 2009 report. He gave the following evidence:

A. I have a vague recollection from what I was cross-examined or – gave evidence to the OPP. They questioned me about "a developer". If Mr. McCowan is that "a developer" I believe that I may have had a conversation a developer [*sic*]. A developer I believe called me at one time, indicated that he had a copy of my 2009 report that he'd been given by a Mr. Nazarian.

Q. Yes.

A. I was asked questions about it. I was asked questions about roofing and was the roofing a problem. I believe I would have told him that my report indicated that roofing needed to be fixed. I believe the developer went on to question other items that were in the report. I don't know who that person was. But he's obviously been given my report by Mr. Nazarian, that's basically all I can recall.

I never came up with a – I was never asked to look at what the roofing repairs would be. I was never asked to come up with a figure of a value of the roofing repairs, so what you've just presented to me doesn't sound factual.

...

Q. Okay. And did you confirm to that person that there were problems with the roof?

A. It said that in my report so I would have confirmed that.

...

Q. Thank you. And did you tell him that over the years mall staff had pushed snow to the side and salted?

A. Absolutely not.

Q. Did you tell him that salt had leaked down the columns and made them not sound?

A. Absolutely not.

Q. Did you tell him everything had to be reinforced and a new roof had to be put on?

A. I would have told him that a new – someone should be putting a new roof on I would have thought. But I wouldn't have told him everything would have to be reinforced.



- Q. But you may have told him that a new roof had to be put on?
- A. I think that was what I'd been telling Mr. Nazarian.
- Q. Okay. So the answer is yes, you might well have told him?
- A. That portion, yes.
- Q. All right. And then on to the next. Did you tell Mr. McCowan that it would cost \$1.5 million to fix the roof?
- A. No.
- Q. And did you tell him that – that when he asked when this money would have to be spent did you reply that it would have to be right away? Do you recall that?
- A. No.
- Q. Did you – are you saying you didn't say it?
- A. I would never – it's probably what I would have thought but no, I didn't say that.
- Q. Might you have said it?
- A. It would be an appropriate thing to say.
- Q. All right. And then Mr. McCowan asked why he couldn't fix it in ten years, do you recall being asked that?
- A. No.
- Q. And you replied that it had to be fixed right away or the roof would cave. Did you say that?
- A. No.
- Q. And did you say anything like that?
- A. No.
- Q. And apparently Mr. McCowan asked when it would cave in and you advised him that you couldn't tell him when but it would be – it would if it was not fixed right away. Did you say those words to him?
- A. Absolutely not.
- Q. And then lastly, did you tell Mr. McCowan that you had told all this to the mall owners?
- A. No.
- Q. All right. So – do you understand that based on the accuracy of this this would imply that the report that you wrote on May 3rd was not accurate because you knew the mall was in trouble, you understand that?
- A. I understand that.
- ...
- Q. My question, Mr. Wood, is did you ever say that there were any problems with the structure of the Algo Mall building to anyone?
- A. No.<sup>250</sup>

I am satisfied that Mr. Wood and Mr. McCowan spoke, and the weight of the evidence is that Mr. Wood conveyed to Mr. McCowan that it was urgent and critical that the Algo Mall roof be repaired. I conclude that it is also probable that Mr. Wood also told Mr. McCowan that he had told the Nazarians that the roof needed to be fixed right away. Mr. McCowan recalled Mr. Wood saying that, and Mr. Wood testified he thought he had been telling Mr. Nazarian that.

## Mr. McCowan seeks a reduction in price because of the roof condition; Eastwood refuses

Mr. McCowan said that, if he had purchased the Mall, he would have started work on the roof immediately, as soon as he could get engineers and quotes. After viewing the M.R. Wright report and speaking to Mr. Wood, the proper thing to do, in his view, was to obtain a detailed engineering assessment of the building, including destructive testing where necessary and use of a camera insertion to get into hidden areas to see how bad the damage was and whether the load capacity of the beams had been affected. He viewed doing this as a moral obligation (“a high test of morality”), and had done similar things in the past when necessary.<sup>251</sup> From this point on, he viewed the need to fix the roof as critical.<sup>252</sup>

Following his conversation with Mr. Wood, Mr. McCowan told Ms. Sherrard to get a reduction in price from Eastwood of at least \$1 million to compensate for the state of the roof. He testified that, although he felt he could address the roof problem, at this point his intention was to walk away from the deal if he did not get the credit he was looking for.<sup>253</sup> Eastwood refused to give the reduction in price that Mr. McCowan was seeking.<sup>254</sup> Mr. McCowan therefore attempted to find other ways to compensate himself for the money he knew he would have to spend on the roof by, for example, seeking credit for the costs to repair fire deficiencies, attribution of rents, and the receipt from Eastwood of the rebate it was going to receive following a reassessment of the amount of property tax it owed. These credits amounted to approximately \$585,000. He also proposed an arrangement that would have had Eastwood pay the penalty for the mortgage discharge and have this sum go to Mr. McCowan if he could convince the bank to waive the penalty. The net effect of all of these would have amounted to a reduction of the price by approximately \$1 million if the penalty were paid to Mr. McCowan.<sup>255</sup>

Levon Nazarian denied that Mr. McCowan claimed an entitlement to these price reductions because of the condition of the roof. He claimed that Mr. McCowan was “skimming away and trying to get the best absolute deal on the property.”<sup>256</sup> Ms. Sherrard testified that it was clear throughout the negotiations that the reason for the price reduction was the need for repairs, but that Levon Nazarian had told her that the documents could not contain any reference to the physical condition of the building.<sup>257</sup>

Bob Nazarian did not agree to Mr. McCowan’s proposal, and the deal fell through in December 2011.<sup>258</sup> Ms. Sherrard and Levon Nazarian briefly revived negotiations in February 2012 for a purchase price of \$5.1 million, but those negotiations were quickly abandoned.<sup>259</sup> Eastwood could have sold the Mall months before the collapse but refused to do so.

Mr. McCowan was asked what he would have done if he had actually purchased the Algo Centre, only to discover that the building needed steel reinforcement, in addition to a new roof, at a potential cost of \$3 million or more. He said this would have been his business gamble, but that it would still have been worthwhile to own the Algo Centre because he would have been acquiring the property for \$7 million in total costs (he likely meant \$8 million), where it would have cost \$40 million to build it from scratch. It was still a “very good deal.”<sup>260</sup>

It may very well be that, if Mr. McCowan had acquired the property, he would have attempted to take the necessary steps to repair it properly. The sad truth, however, is that, at this juncture, the building was on the verge of collapsing. It needed much more than a membrane on the roof.

**It may very well be that, if Mr. McCowan had acquired the property, he would have attempted to take the necessary steps to repair it properly. The sad truth, however, is that, at this juncture, the building was on the verge of collapsing. It needed much more than a membrane on the roof.**

## Notes

- <sup>1</sup> Bauthus testimony, May 21, 2013, pp. 10622–3.
- <sup>2</sup> Exhibit 5495.
- <sup>3</sup> Levon Nazarian testimony, July 15, 2013, p. 16399.
- <sup>4</sup> Levon Nazarian testimony, July 15, 2013, pp. 16355–7.
- <sup>5</sup> Levon Nazarian testimony, July 15, 2013, p. 16400.
- <sup>6</sup> Bob Nazarian testimony, July 26, 2013, pp. 18322–3.
- <sup>7</sup> Levon Nazarian testimony, July 15, 2013, pp. 16400–3.
- <sup>8</sup> Exhibit 1305.
- <sup>9</sup> Levon Nazarian testimony, July 15, 2013, pp. 16404–6.
- <sup>10</sup> Exhibit 5499.
- <sup>11</sup> Exhibit 1305.
- <sup>12</sup> Levon Nazarian testimony, July 15, 2013, pp. 16406–7.
- <sup>13</sup> Exhibit 1305.
- <sup>14</sup> Levon Nazarian testimony, July 15, 2013, pp. 16410–2.
- <sup>15</sup> Levon Nazarian testimony, July 15, 2013, pp. 16413–16.
- <sup>16</sup> Levon Nazarian testimony, July 15, pp. 16406–10.
- <sup>17</sup> Exhibit 5504.
- <sup>18</sup> Levon Nazarian testimony, July 15, 2013, pp. 16428–31.
- <sup>19</sup> Levon Nazarian testimony, July 15, 2013, pp. 16432–3.
- <sup>20</sup> Levon Nazarian testimony, July 15, 2013, p. 16433.
- <sup>21</sup> Exhibit 1639.
- <sup>22</sup> Exhibit 1639.
- <sup>23</sup> Levon Nazarian testimony, July 15, 2013, pp. 16436–9.
- <sup>24</sup> Exhibit 1635; Levon Nazarian testimony, July 15, 2013, pp. 16445–7.
- <sup>25</sup> Levon Nazarian testimony, July 16, 2013, pp. 16474–6; Exhibit 1633.
- <sup>26</sup> Levon Nazarian testimony, July 16, 2013, pp. 16476–7; Exhibit 5529.
- <sup>27</sup> Jamie Hass testimony, June 14, 2013, pp. 14599–60.
- <sup>28</sup> Exhibit 1638.
- <sup>29</sup> Levon Nazarian testimony, July 16, 2013, pp. 16479–82; Exhibit 1308.
- <sup>30</sup> Exhibit 5551.
- <sup>31</sup> Levon Nazarian testimony, July 16, 2013, p. 16488.
- <sup>32</sup> Levon Nazarian testimony, July 16, 2013, p. 16490.
- <sup>33</sup> Levon Nazarian testimony, July 16, 2013, pp. 16493–8; Exhibit 5552.
- <sup>34</sup> Levon Nazarian testimony, July 16, 2013, pp. 16493–7; Exhibit 5552.
- <sup>35</sup> Exhibit 1351.
- <sup>36</sup> Levon Nazarian testimony, July 16, 2013, pp. 16491–3.
- <sup>37</sup> Levon Nazarian testimony, July 16, 2013, p. 16493.
- <sup>38</sup> Exhibit 5553.
- <sup>39</sup> Levon Nazarian testimony, July 16, 2013, pp. 16500–4.
- <sup>40</sup> Levon Nazarian testimony, July 16, 2013, pp. 16504–6.
- <sup>41</sup> Levon Nazarian testimony, July 16, 2013, pp. 16503–4.
- <sup>42</sup> Levon Nazarian testimony, July 16, 2013, p. 16545.
- <sup>43</sup> Levon Nazarian testimony, July 16, 2013, pp. 16543–8.
- <sup>44</sup> McCulloch testimony, June 13, 2013, pp. 14480–1; Exhibit 13-44.
- <sup>45</sup> McCulloch testimony, June 13, 2013, p. 14482; Exhibit 13-45.
- <sup>46</sup> Cuthbertson testimony, May 1, 2013, p. 7886.
- <sup>47</sup> Exhibit 13-197.
- <sup>48</sup> Exhibits 13-50 and 13-51.
- <sup>49</sup> Exhibit 13-51.
- <sup>50</sup> Exhibit 13-51.
- <sup>51</sup> McCulloch testimony, June 13, 2013, pp. 14483–6.
- <sup>52</sup> Exhibit 13-53.
- <sup>53</sup> McCulloch testimony, June 13, 2013, pp. 14488–9.
- <sup>54</sup> Bob Nazarian testimony, July 26, 2013, pp. 18334–43; Exhibit 1422.
- <sup>55</sup> Bauthus testimony, May 21, 2013, pp. 10621–2.
- <sup>56</sup> Exhibit 3543.
- <sup>57</sup> Bauthus testimony, May 21, 2013, pp. 10622–3.
- <sup>58</sup> Bauthus testimony, May 21, 2013, p. 10623.
- <sup>59</sup> Ewald testimony, May 27, 2013, pp. 11720–1; Exhibit 168, p. 43.
- <sup>60</sup> Exhibit 102, p. 006; Ewald testimony, May 27, 2013, pp. 11674–5.
- <sup>61</sup> Ewald testimony, May 27, 2013, pp. 11722–4.
- <sup>62</sup> Ewald testimony, May 27, 2013, pp. 11725–7.
- <sup>63</sup> Ewald testimony, May 27, 2103, p. 11725.
- <sup>64</sup> Bauthus testimony, May 21, 2013, p. 10620.
- <sup>65</sup> Bauthus testimony, May 21, 2013, pp. 10620–1.
- <sup>66</sup> Exhibit 3549.
- <sup>67</sup> Ewald testimony, May 27, 2013, p. 11729.
- <sup>68</sup> Clouthier testimony, April 23, 2013, pp. 6472–3.
- <sup>69</sup> deBortoli testimony, June 12, 2013, pp. 14220–1; Exhibit 931.
- <sup>70</sup> Exhibit 930.
- <sup>71</sup> deBortoli testimony, June 12, 2013, pp. 14221–4; Exhibit 930.
- <sup>72</sup> Exhibits 11-229, 11-230, 11-231, 11-232, 11-233, 11-234.
- <sup>73</sup> Hamilton testimony, July 9, 2013, pp. 15320–5.
- <sup>74</sup> Sarvinis testimony, June 5, 2013, p. 12890; Levon Nazarian testimony, July 16, 2013, pp. 16548–53.
- <sup>75</sup> Sarvinis testimony, June 5, 2013, pp. 12886–90, 12961.
- <sup>76</sup> Exhibit 733.
- <sup>77</sup> Levon Nazarian testimony, July 16, 2013, pp. 16564–5; Sarvinis testimony, June 5, 2013, p. 12904.
- <sup>78</sup> Levon Nazarian testimony, July 16, 2013, p. 16564.
- <sup>79</sup> Exhibit 733.
- <sup>80</sup> Levon Nazarian testimony, July 16, 2013, pp. 16567–8.
- <sup>81</sup> Sarvinis testimony, June 5, 2013, pp. 12899–900.
- <sup>82</sup> Sarvinis testimony, June 5, 2013, pp. 12896–9, 12958–9.
- <sup>83</sup> Sarvinis testimony, June 5, 2013, pp. 12906–7.
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- <sup>87</sup> Sarvinis testimony, June 5, 2013, p. 12906.
- <sup>88</sup> Bob Nazarian testimony, July 26, 2013, pp. 18406–7.
- <sup>89</sup> Bob Nazarian testimony, July 26, 2013, p. 18359; Levon Nazarian testimony, July 16, 2013, p. 16566.
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- <sup>91</sup> Levon Nazarian testimony, July 16, 2013, pp. 16578–9.
- <sup>92</sup> Exhibit 5585.
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- <sup>96</sup> Levon Nazarian testimony, July 16, 2013, pp. 16584–5.
- <sup>97</sup> Levon Nazarian testimony, July 16, 2013, pp. 16597, 16615.
- <sup>98</sup> Exhibit 4597.
- <sup>99</sup> Levon Nazarian testimony, July 16, 2013, pp. 16615–18.
- <sup>100</sup> Exhibit 5626.
- <sup>101</sup> Bob Nazarian testimony, July 26, 2013, pp. 18385–6; see also Levon Nazarian testimony, July 16, 2013, p. 16598.
- <sup>102</sup> Exhibit 5626.
- <sup>103</sup> Exhibit 728.
- <sup>104</sup> Exhibit 155; Exhibit 341; Sprague testimony, July 12, 2013, pp. 16109–13.
- <sup>105</sup> Bob Nazarian testimony, July 26, 2013, pp. 18424–31; Levon Nazarian testimony, July 16, 2013, pp. 16649–52.



- <sup>106</sup> Exhibit 729.
- <sup>107</sup> Levon Nazarian testimony, July 16, 2013, pp. 16600–1.
- <sup>108</sup> Levon Nazarian testimony, July 16, 2013, p. 16649.
- <sup>109</sup> Sarvinis testimony, June 5, 2013, p. 12914.
- <sup>110</sup> Exhibit 734.
- <sup>111</sup> Bob Nazarian testimony, July 26, 2013, pp. 18438–41; Levon Nazarian testimony, July 16, 2013, pp. 16661–4; Sarvinis testimony, June 5, 2013, p. 12915.
- <sup>112</sup> Sarvinis testimony, June 5, 2013, p. 12912.
- <sup>113</sup> Sarvinis testimony, June 5, 2013, pp. 12948–9.
- <sup>114</sup> Exhibit 355.
- <sup>115</sup> Exhibit 356, p. 5403.
- <sup>116</sup> Exhibit 1741; deBortoli testimony, June 12, 2013, pp. 14227–31.
- <sup>117</sup> Hamilton testimony, July 9, 2013, pp. 15331–2; Exhibit 1542.
- <sup>118</sup> Exhibit 11–155.
- <sup>119</sup> deBortoli testimony, June 12, 2013, pp. 14151–7.
- <sup>120</sup> deBortoli testimony, June 12, 2013, pp. 14164–5.
- <sup>121</sup> deBortoli testimony, June 12, 2013, pp. 14179–80, 14215–17.
- <sup>122</sup> Exhibit 361.
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- <sup>124</sup> deBortoli testimony, June 12, 2013, pp. 14241–3; Sprague testimony, July 12, 2013, p. 16103.
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- <sup>126</sup> Bob Nazarian testimony, July 29, 2013, pp. 18344–6; July 29, 2013, p. 18637; Levon Nazarian testimony, July 16, 2013, pp. 16544–5.
- <sup>127</sup> Exhibit 5569.
- <sup>128</sup> Bob Nazarian testimony, July 26, 2013, pp. 18344–5; July 29, 2013, pp. 18636–7.
- <sup>129</sup> Exhibit 5571.
- <sup>130</sup> Exhibit 6212.
- <sup>131</sup> Bob Nazarian testimony, July 29, 2013, p. 18642.
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- <sup>133</sup> Exhibit 6216; Bob Nazarian testimony, July 29, 2013, pp. 18640–42.
- <sup>134</sup> Exhibit 6216; Exhibit 5646.
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- <sup>137</sup> Exhibit 1485, p. 328.
- <sup>138</sup> Levon Nazarian testimony, July 16, 2013, pp. 16672–5.
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- <sup>143</sup> McCowan testimony, June 10, 2013, pp. 13544–7.
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- <sup>145</sup> Exhibit 5163.
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- <sup>147</sup> Exhibit 5163.
- <sup>148</sup> Levon Nazarian testimony, July 15, 2013, p. 16366.
- <sup>149</sup> Bob Nazarian testimony, July 25, 2013, pp. 18289–91.
- <sup>150</sup> Levon Nazarian testimony, July 15, 2013, pp. 16371–4.
- <sup>151</sup> McCowan testimony, June 10, 2013, pp. 13567–70.
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- <sup>153</sup> Exhibit 1233 p. 0035; McCowan testimony, June 10, 2013, pp. 13568–70.
- <sup>154</sup> McCowan testimony, June 10, 2013, pp. 13570–1.
- <sup>155</sup> Exhibit 5638, Levon Nazarian testimony, July 16, 2013, pp. 16680–1.
- <sup>156</sup> Exhibit 5638, p. 0046.
- <sup>157</sup> Exhibit 1497.
- <sup>158</sup> Levon Nazarian testimony, July 16, 2013, p. 16703.
- <sup>159</sup> deBortoli testimony, June 12, 2013, pp. 14245–6.
- <sup>160</sup> deBortoli testimony, June 12, 2013, p. 14254.
- <sup>161</sup> Bob Nazarian testimony, July 26, 2013, pp. 18394–5; Exhibit 922.
- <sup>162</sup> deBortoli testimony, June 12, 2013, pp. 14256–62.
- <sup>163</sup> Exhibit 922, p. 003.
- <sup>164</sup> Bob Nazarian testimony, July 26, 2013, p. 18398.
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- <sup>166</sup> Bob Nazarian testimony, July 26, 2013, p. 18399.
- <sup>167</sup> Bob Nazarian testimony, July 26, 2013, pp. 18399–400.
- <sup>168</sup> Bob Nazarian testimony, July 26, 2013, pp. 18474–6; Levon Nazarian testimony, July 16, 2013, pp. 16703–7; Sarvinis testimony, June 5, 2013, p. 12916.
- <sup>169</sup> Sarvinis testimony, June 5, 2013, pp. 12916–17.
- <sup>170</sup> Exhibit 107.
- <sup>171</sup> Exhibit 1072, p. 0031.
- <sup>172</sup> Bob Nazarian testimony, July 26, 2013, p. 18489.
- <sup>173</sup> Exhibit 1080.
- <sup>174</sup> Bob Nazarian testimony, July 26, 2013, pp. 18481–2.
- <sup>175</sup> Fabris testimony, July 11, 2013, p. 15771.
- <sup>176</sup> Sarvinis testimony, June 5, 2013, p. 12917.
- <sup>177</sup> Sarvinis testimony, June 5, 2013, p. 12918; Exhibit 4715.
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- <sup>183</sup> Bob Nazarian testimony, July 26, 2013, pp. 18490–1.
- <sup>184</sup> Exhibit 4781.
- <sup>185</sup> Exhibit 4781.
- <sup>186</sup> Levon Nazarian testimony, July 16, 2013, pp. 16738–9.
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- <sup>191</sup> Hamilton testimony, July 9, 2013, pp. 15332–4.
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- <sup>202</sup> Exhibit 1034; Sprague testimony, July 12, 2013, pp. 16117–20.
- <sup>203</sup> Ewald testimony, May 27, 2013, p. 11739.
- <sup>204</sup> Ewald testimony, May 27, 2013, pp. 11732–4.
- <sup>205</sup> Ewald testimony, May 27, 2013, p. 11733.
- <sup>206</sup> Exhibit 311.
- <sup>207</sup> Exhibit 155.
- <sup>208</sup> Bear testimony, June 11, 2013, p. 13876.
- <sup>209</sup> Hamilton testimony, July 9, 2013, pp. 15338–42.
- <sup>210</sup> Exhibits 3674 and 311; Hamilton testimony, July 9, 2013, pp. 15338–42; Sprague testimony, July 12, 2013, pp. 16120–4.
- <sup>211</sup> deBortoli testimony, June 12, 2013, p. 14277.
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- <sup>213</sup> deBortoli testimony, June 12, 2013, pp. 14280–1.
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- <sup>215</sup> Exhibits 155 and 918; Collett testimony, May 24, 2013, pp. 11297–303.
- <sup>216</sup> Collett testimony, May 24, 2013, pp. 11302–3.
- <sup>217</sup> Collett testimony, May 24, 2013, pp. 11305–6.
- <sup>218</sup> Hamilton testimony, July 10, 2013, p. 15358.
- <sup>219</sup> Collett testimony, May 24, 2013, pp. 11306–7, 11362–5; Hamilton testimony, July 10, 2013, pp. 15357–63; Bear testimony, June 11, 2013, pp. 13899–902; Exhibit 3682.
- <sup>220</sup> Bear testimony, June 11, 2013, pp. 13899–902; Exhibits 4851 and 4862.
- <sup>221</sup> Bob Nazarian testimony, July 25, 2013, p. 18265.
- <sup>222</sup> Hamilton testimony, July 10, 2013, pp. 15357–63; deBortoli testimony, June 12, 2013, pp. 14288–9; Ewald testimony, May 27, 2013, pp. 11746–7.
- <sup>223</sup> Exhibit 5668.
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- <sup>232</sup> Exhibit 5701; Levon Nazarian testimony, July 17, 2013, pp. 16833–9.
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- <sup>237</sup> Sarvinis testimony, June 5, 2013, p. 12940; Bob Nazarian testimony, July 26, 2013, pp. 18536–9; Levon Nazarian testimony, July 17, 2013, p. 16854; Exhibit 4740.
- <sup>238</sup> Exhibit 1776; McCowan testimony, June 10, 2013, pp. 13575–81.
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- <sup>240</sup> Levon Nazarian testimony, July 17, 2013, pp. 16842–3.
- <sup>241</sup> McCowan testimony, June 10, 2013, pp. 13584–6.
- <sup>242</sup> McCowan testimony, June 10, 2013, p. 13587.
- <sup>243</sup> Levon Nazarian testimony, July 17, 2013, pp. 16887–95; Exhibits 5176, 5177, 5182, 5745, 5755, 5756.
- <sup>244</sup> McCowan testimony, June 10, 2013, pp. 13614–15; Exhibit 5164, pp. 0032, 070–7; Sherrard testimony, August 6, 2013, pp. 19653–4, 19672; Levon Nazarian testimony, July 17, 2013, p. 16858.
- <sup>245</sup> McCowan testimony, June 10, 2013, pp. 13635–42, 13740–1.
- <sup>246</sup> McCowan testimony, June 10, 2013, p. 13642.
- <sup>247</sup> McCowan testimony, June 10, 2013, pp. 13641–3, 13740.
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- <sup>251</sup> McCowan testimony, June 10, 2013, pp. 13642, 13649–51.
- <sup>252</sup> McCowan testimony, June 10, 2013, p. 13643.
- <sup>253</sup> McCowan testimony, June 10, 2013, p. 13644; Sherrard testimony, August 6, 2013, pp. 19682–3.
- <sup>254</sup> McCowan testimony, June 10, 2013, pp. 13686–7; Sherrard testimony, August 6, 2013, p. 19670.
- <sup>255</sup> McCowan testimony, June 10, 2013, pp. 13658–60, 13670–85; Levon Nazarian testimony, July 17, 2013, pp. 16921–32; Exhibit 5184; Sherrard testimony, August 6, 2013, pp. 19681–92.
- <sup>256</sup> Levon Nazarian testimony, July 17, 2013, pp. 16930–1.
- <sup>257</sup> Sherrard testimony, August 6, 2013, pp. 19683–4.
- <sup>258</sup> McCowan testimony, June 10, 2013, p. 13800; Levon Nazarian testimony, July 17, 2013, pp. 16931–2; Sherrard testimony, August 6, 2013, p. 19692.
- <sup>259</sup> McCowan testimony, June 10, 2013, pp. 13690–6; Levon Nazarian testimony, July 17, 2013, pp. 16934–41; Exhibits 5779, 5295, and 5296.
- <sup>260</sup> McCowan testimony, June 10, 2013, pp. 13803–5.

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## In 2011 pieces of concrete fell from the hollow core slabs

### May 2011: The owner of Hungry Jack's restaurant discovers pieces of concrete protruding from the ceiling tile

Hungry Jack's Restaurant became a tenant of the Algo Mall in 2006. Owned and operated by Elaine and Jack Quinte, it was located in the food court, facing the lottery kiosk on the upper level of the Mall.<sup>1</sup>

Like many of the other tenants located on the upper level, Hungry Jack's experienced leaks. The leaks occurred mostly in the final years, starting approximately at the end of 2010 and continuing into 2012. Initially, it experienced water leaks only a couple of times a year, but the frequency increased in 2011 and 2012.<sup>2</sup>

In May 2011, an incident occurred in Hungry Jack's that, if properly responded to by the Mall owner and the City of Elliot Lake, could have led to the closure of the Mall. At the very least, the Mall owner could have been forced to properly investigate the incident. Unfortunately, as with all the other warning signs, this incident was all but ignored by City officials and the Mall owner for fear that an investigation might lead to the closure of the Mall.

Mrs. Quinte recounted for the Commission the events that occurred in Hungry Jack's at the end of May 2011. Although she could not be sure of the exact date, she was reasonably confident that the incident had occurred in May 2011, a little over a year before the collapse. Mrs. Quinte was forthright and produced photographs to corroborate her account of the event. I have no reason to reject her evidence.

On the day in question, Mrs. Quinte arrived at Hungry Jack's at approximately 7:00 a.m. and noticed debris on the floor that she described as pieces of crushed concrete. When she looked up at the ceiling above the debris, she noticed something protruding from the ceiling tile. She described it as "a spearhead that had come through the tile." It was ultimately determined that two pieces of concrete had broken from the hollow core slabs above, one piece smaller than the other. Those pieces were protruding through the ceiling tiles.<sup>3</sup>

Mrs. Quinte immediately attempted to contact the Mall manager, Rhonda Bear, but was not able to reach her. She then called the front desk of the Hotel and requested maintenance staff. Paul Hachey and Joe Hammond, two of the Mall maintenance workers, went to the restaurant. The pieces of concrete had not fallen through the ceiling tiles but were merely protruding through them. Mr. Hachey retrieved pieces of concrete from the ceiling. Mrs. Quinte recalled that the pieces were "extremely heavy" and had a rough and dry texture. The first piece was approximately 24 to 30 inches long; the second piece was shorter, approximately 12 inches long. Mrs. Quinte estimated that the larger piece of concrete weighed 20 pounds. The two pieces were taken to Mrs. Quinte's office inside Hungry Jack's, where they remained until the day of the collapse. Mrs. Quinte testified that she held on to the pieces of concrete because it was "just proof and evidence that something had fallen through." Mr. Hammond and Mrs. Quinte took photographs of the concrete pieces.<sup>4</sup>

The photographs taken by Mr. Hammond and Mrs. Quinte depicted

- the wire mesh holding the insulation in place, through which the concrete had fallen;
- the larger of the two pieces of concrete that had fallen through the ceiling tiles; and
- the smaller of the two pieces of concrete that had fallen through the ceiling tiles (see figure 1.12.1).



**Figure 1.12.1** Pieces of hollow core slabs fall through wire mesh into ceiling tiles at Hungry Jack's

Source Exhibit 2359

Ms. Bear arrived at the restaurant while the concrete was being removed from the ceiling. She advised Mrs. Quinte that she would notify Bob Nazarian and that they would have an engineer investigate the situation and provide a report. An engineer never went to the restaurant to conduct an investigation.<sup>5</sup> Ms. Bear could not recall having advised Mrs. Quinte that an engineer would be called to investigate, but confirmed that she could have made such a statement at the time.<sup>6</sup> Ms. Bear never documented the incident.

Mrs. Quinte did not make a complaint to the Ministry of Labour following the discovery of the fallen concrete. Ed Hudson confirmed that he was never notified that a piece of concrete had fallen through the ceiling tile at Hungry Jack's. Although he was at the Mall on June 1, 2011, in his capacity as a Ministry of Labour inspector, the incident was not brought to his attention.<sup>7</sup>

Mrs. Quinte testified that she followed up approximately two to two-and-a-half weeks after the incident and was advised by Ms. Bear that the Mall had taken no steps.<sup>8</sup>



## The Mall owners are notified of the fallen concrete and do nothing in response

Although Ms. Bear had been working at the Mall for only a short time when she received the call from Mrs. Quinte,<sup>9</sup> this event was one of many that had occurred since the start of her employment. Ms. Bear considered the incident in Hungry Jack's to have been a one-time occurrence and not symptomatic of a more serious problem. She forwarded the information to Bob Nazarian.<sup>10</sup>

Ms. Bear confirmed that the material shown to her by Mrs. Quinte appeared to be concrete, but that she did not touch it or pick it up.<sup>11</sup> She testified that, although the concrete had fallen from above Hungry Jack's, she did not believe it was an indication that more of the concrete throughout the building would be falling. She agreed that, without an investigation, she would not have any information about the state of the hollow core slabs throughout the building. She confirmed that the area from which the concrete had fallen had a lot of leaks; however, she never made the connection between the fallen concrete and the leaks in the area.<sup>12</sup>

Bob Nazarian confirmed that Ms. Bear telephoned to alert him to the incident. He indicated that, in response to the information provided to him, he called engineer Robert Wood to advise him of what had occurred and requested that he go to the Mall to have a look and prepare a structural report. Mr. Nazarian also indicated that he received photographs from Ms. Bear; however, the photographs were in black and white and he was unable to make out any details.<sup>13</sup>

Bob Nazarian alleged in his testimony that Ms. Bear advised him she had seen the material; it appeared to be fireproofing that had fallen off, it was not of concern, and she would advise him if anything new arose. Mr. Nazarian testified that he instructed Ms. Bear to call Mr. Wood if anything else occurred.<sup>14</sup> He and Levon Nazarian both testified that Ms. Bear had described the material as "mushy."<sup>15</sup>

Ms. Bear's recollection of the details of the event in general was in keeping with the evidence given by Mrs. Quinte and other witnesses and was also significantly different from the evidence given by Bob Nazarian and Levon Nazarian. I have no reason to reject her evidence. She testified that she advised Bob Nazarian that a piece of concrete had fallen from the hollow core slabs above Hungry Jack's. Ms. Bear did not recall reporting the incident to Levon Nazarian. She specifically denied advising Bob Nazarian that the fallen material was fireproofing. Ms. Bear testified that the incident occurred early in her employment, and at that time she would not have known what fireproofing looked like. She denied describing the material as "mushy." She added that she never received instructions from Levon Nazarian regarding this incident and, in particular, did not receive instructions to contact Mr. Wood.<sup>16</sup>

Ms. Bear indicated that she did not recall receiving instructions from Bob Nazarian to contact an engineer. She testified that, if she had received those instructions, she would have followed them.<sup>17</sup> Ms. Bear indicated she never thought to notify anyone at the City of Elliot Lake about the fallen concrete.<sup>18</sup>

Mr. Wood also contradicted the evidence given by Bob Nazarian and indicated that he was never advised that concrete had fallen in the Mall. Mr. Wood indicated that, if he had received notice, he would have been horrified. On reviewing the photographs taken by Mrs. Quinte and Mr. Hammond, he confirmed that he likely would have closed the Mall. Mr. Wood further elaborated on this statement and indicated that he was of the view that falling concrete was a serious structural concern which would have warranted closing the Mall.<sup>19</sup>

No evidence was presented to corroborate Bob Nazarian's recollection. In addition, he acknowledged that no report was ever prepared by Mr. Wood regarding the concrete and that no reference to the fallen concrete appeared in the report that was ultimately prepared by Mr. Wood in May 2012.<sup>20</sup>

Levon Nazarian testified that it was June 2011 when he first learned that something had fallen through the ceiling of Hungry Jack's, and that this information had come from Ms. Bear. He gave a similar account to the one given by his father; namely, that Ms. Bear had assured him that the fallen material was fireproofing. Levon Nazarian testified that he had also asked Ms. Bear to advise Mr. Wood prepare a report on this issue, and on any other issues of concern in the Mall.<sup>21</sup>

Levon Nazarian initially testified that a structural report was being obtained in the summer of 2011 to fulfill the conditions to obtain financing from the Business Development Bank of Canada (BDC).<sup>22</sup> He ultimately agreed that, as of June–July 2011, no one from Eastwood Mall, including himself, had had any discussions with a structural engineer about completing such a report.<sup>23</sup>

Levon Nazarian confirmed that he received photographs of the fallen material, but he could not recall which of the photographs in Exhibit 2359 he had received. Levon Nazarian was given the opportunity to review the photographs during his testimony but was not prepared to agree that they showed concrete. He indicated that he preferred to go by what he said Ms. Bear had told him at the time, which was that the material was not concrete.<sup>24</sup> He was insistent that he preferred to rely on the information supplied to him at the time by Ms. Bear – despite the fact that she denied in her testimony having advised him that it was fireproofing, and despite the fact that she had no expertise in these matters.

There was no evidence presented to support the contention that Ms. Bear had been instructed to contact Mr. Wood, and certainly no evidence to indicate that Mr. Wood had been asked to prepare a structural report at any point in 2011. I reject Levon Nazarian's evidence that Ms. Bear had been instructed to contact Mr. Wood to investigate this issue. It is wholly unreliable, in my opinion. Mr. Nazarian also testified that he reminded Ms. Bear in early 2012 to tell Mr. Wood about the concrete incident in Hungry Jack's, when Mr. Wood was hired to prepare a structural report.<sup>25</sup> Once again, I do not accept this evidence.

**This incident and the Nazarians' inaction serve to illustrate further their callous attitude toward Mall safety and their unwillingness to proactively ensure that the growing list of problems occurring on their watch was effectively remedied.**

I am confident that, if Ms. Bear had been instructed to contact Mr. Wood about this incident, she would have done so. Ms. Bear had nothing to lose by contacting an engineer to have him come out to look at the fallen concrete. Bob and Levon Nazarian, in contrast, had much to lose by having an engineer go to the Mall to investigate. At the time this incident occurred, they were in negotiations with the BDC to obtain financing for the Mall. This incident, if fully investigated by an engineer, would have likely jeopardized the financing and potentially closed the Mall.

Although there was no evidence of active concealment of this incident, I accept the evidence of Ms. Bear that she never received instruction to retain an engineer to investigate the matter. No steps were taken by the Nazarians to investigate what caused the concrete to fall. Even if I were to accept that Levon Nazarian and Bob Nazarian had instructed Ms. Bear to contact Mr. Wood, they never followed

up and took no steps to ensure that an engineer had been called. This incident and the Nazarians' inaction serve to illustrate further their callous attitude toward Mall safety and their unwillingness to proactively ensure that the growing list of problems occurring on their watch was effectively remedied.

## The City of Elliot Lake is notified that concrete had fallen into the Mall from the hollow core slab

In the weeks and months that followed the discovery of the concrete that had fallen into Hungry Jack's, Mrs. Quinte informed three officials within the City of Elliot Lake about the incident: Councillor Al Collett, Mayor Richard Hamilton, and Darren Connors of the Fire Department.<sup>26</sup>

The only individual who took any steps or made any attempt to bring this matter to the attention of the Elliot Lake Building Department was Councillor Collett. Mrs. Quinte testified that, although both Mayor Hamilton and Mr. Connors expressed concern about the fallen concrete, neither one of them provided her with any advice or direction on what to do about the situation.<sup>27</sup> Although Councillor Collett's evidence differs slightly from that of Mrs. Quinte, as to who notified him of the incident, he acknowledged being told about the fallen concrete.

A few weeks after the discovery of the concrete, Mrs. Quinte spoke to Councillor Collett and advised him that pieces of concrete had fallen through the ceiling tiles in her restaurant.<sup>28</sup> Although she did not specifically ask Councillor Collett to provide the information to City Council or the Building Department, she believed that, by informing him of the incident, she was effectively making a complaint to the City. Councillor Collett did not advise Mrs. Quinte that she was required to submit a written complaint to the Building Department to trigger an inspection.<sup>29</sup>

Councillor Collett recalled that Jack Quinte, Mrs. Quinte's husband and the co-owner of the restaurant, told him that concrete had fallen in Hungry Jack's. He confirmed that he was also shown a piece of the concrete that had fallen through the ceiling tile. Following his discussion with Mr. Quinte, Councillor Collett immediately went to the Building Department and informed Bruce Ewald, the chief building official, of the incident.<sup>30</sup> Councillor Collett testified that, when Mr. Ewald was asked what steps he was going to take, he (Mr. Ewald) responded that "it would look very bad for the City to shut the Mall down"; to which Councillor Collett testified he responded: "[W]hat are we waiting for, somebody to die?"<sup>31</sup>

**"[W]hat are we waiting for,  
somebody to die?"  
– Councillor Collett**

Councillor Collett testified that he did not instruct Mr. Quinte to speak directly to Mr. Ewald because Mr. Quinte had made the complaint to him, and it was his duty, as a representative of the City, to bring the complaint to Mr. Ewald. Councillor Collett denied that Mr. Ewald advised him that Mr. Quinte himself was required to make a complaint to Mr. Ewald under the Property Standards By-law, or that it was improper for Councillor Collett to have made the complaint directly to Mr. Ewald.<sup>32</sup> The incident was mentioned to other City councillors by Councillor Collett; however, he was unable to identify with whom he had shared this information.<sup>33</sup>

Councillor Collett expected that Mr. Ewald would fulfill his obligations and address the complaint, and that it would not be necessary for him to follow up to ensure that something was being done.<sup>34</sup>

Mayor Hamilton denied he was told of the concrete incident by Mrs. Quinte and testified that he learned of the fallen concrete in Hungry Jack's only after the collapse. He indicated that he learned of the incident from some of the City councillors and it was only two to three weeks after the collapse that he discussed the matter with Mr. Ewald. Mayor Hamilton denied that Councillor Collett had advised him and Council before the collapse. Mayor Hamilton denied seeing the piece of concrete before the collapse.<sup>35</sup> Mr. Connors was not called to testify on this issue.



## The chief building official is aware that concrete had fallen from the hollow core slab in the Mall, but does not investigate

Mr. Ewald confirmed that he did speak to Councillor Collett about a piece of concrete falling into a restaurant. At the time, Mr. Ewald did not know who Mr. Quinte was or the identity of the restaurant in question. Mr. Ewald testified that, when he was informed of the situation, he indicated to Councillor Collett that he should have the restaurant owner contact him directly.<sup>36</sup> Mr. Ewald explained that it was his practice to direct councillors to ask complainants to contact him directly to ensure that he obtained the correct information. He agreed that the conversation with Councillor Collett constituted a complaint but, in Mr. Ewald's opinion, the councillor did not have enough information about the incident. Mr. Ewald agreed that, when it comes to matters of public safety, he has the authority to act in the absence of a complaint, and, in hindsight, the information received from Councillor Collett should have triggered action on his part.<sup>37</sup>

Mr. Ewald testified that, despite his acknowledgement that the fallen concrete could be an indication of a potential structural problem, he did not investigate the incident because the conversation with Councillor Collett had taken place when he was on his way out of the office and he did not ask for the location of the restaurant.<sup>38</sup>

At the time of the discussion with Councillor Collett, Mr. Ewald did not string together the following facts:

- A piece of concrete had fallen in the Mall.
- Nine months before the concrete fell in Hungry Jack's, the Mall owner told City Council that the roof had to be fixed and the rooftop parking eliminated.
- An order and a notice requiring structural engineering assessments had previously been issued by the City.
- Mr. Ewald testified that, if he had put all these events together, it would have been enough to trigger an inspection at the Mall.<sup>39</sup>

Mr. Ewald confirmed that he did say to Councillor Collett: "[W]hat do you want me to do, Al, close down the mall." He explained that it would have been economically detrimental to the City if the Mall were closed down, but that he would have closed it had he known there was a structural problem.<sup>40</sup> Despite Mr. Ewald's acknowledgement that the concrete falling could be a sign of a potential structural issue, he never took any steps to investigate the concrete that had fallen in Hungry Jack's.

**"[W]hat do you want me to do, Al, close down the mall."  
– Bruce Ewald**

Despite his expressed concern over the situation, Councillor Collett took no steps to ensure that it was adequately addressed. He did nothing beyond bringing the concern to Mr. Ewald's attention. Once that was done, he all but forgot about it. Councillor Collett clearly believed, and the photographs showed, that a piece of concrete had broken off the hollow core slabs and fallen. This incident should

have set off significant alarm bells for the City of Elliot Lake and, in particular, the Building Department. It did not. Clearly, Mr. Ewald was less concerned with the safety of the public at the Mall and more concerned with the political and economic fallout of taking steps that might lead to a Mall shutdown if an investigation revealed a serious structural problem. It was only in hindsight, after the Mall had collapsed, that Mr. Ewald realized the information received from Councillor Collett should have triggered action on his part.

The response from the City was consistent with what had been done in previous years. Nothing.

## The condition of the Mall deteriorates in 2011 and 2012

### Numerous tenants complain about the leaks and state of disrepair

A document prepared on April 27, 2011, by one tenant, the Algoma District Services Administration Board, described numerous leaks in its Mall offices, causing water damage and staining of ceiling tiles.<sup>41</sup> Dollarama management, in November 2011, described a roof that leaked whenever it rained or snow melted, coupled with stained ceiling tiles and light fixtures that had fallen down because the wires holding them up had rusted through.<sup>42</sup> The manager of the Bargain Shop, who began employment in June 2011, said that the leaks in his store needed to be diverted using a bladder. The co-owner of Kreations & Things described the need for a similar mechanism in his store, which Mall maintenance staff installed to deal with a major roof leak.<sup>43</sup> The North Channel Literacy Council moved into the Mall in March 2012 and soon experienced a major leak in the director's office. This tenant began to explore moving out of the Mall as soon as possible, despite having just moved in.<sup>44</sup> The Commission received evidence of numerous other complaints and observations of this nature.<sup>45</sup>

Numerous tenants or patrons of the Mall described Zellers and the lottery kiosk area – where the collapse occurred – as areas of particular concern for leaks.<sup>46</sup> Mrs. Quinte told the Commission about a beam in the food court area that was exposed by cracked drywall, and an “extreme amount of leaking” around the lottery kiosk area.<sup>47</sup> Councillor Collett, also a master electrician who occasionally did work at the Mall, confirmed in his evidence that the kiosk was a major area of leakage. He was at the Mall only a month before the collapse, working in the upper kiosk area. He opened up the ceiling tile right above the kiosk area and saw an electrical junction box filled with water that had shorted out as a result. He drained the water and repaired the short circuit. He said he could see the water dripping off the beams.<sup>48</sup>

In addition, the Commission received evidence of serious disorder and disrepair at the Mall in its final years. Some of the complaints related to air conditioning and heating issues, problems with electricity and broken light fixtures, cracks in the ceiling and drywall, and broken-down or malfunctioning escalators and elevators.<sup>49</sup>

### Mortgage inspection in October 2011 described the deterioration

On September 14, 2011, the Canada Mortgage Inspection Service, on behalf of the Royal Bank, the administrator of Eastwood's mortgage, inspected the Mall. The inspection report had some positive findings, but generally it provided an unflattering picture of the property for the lender. Following is a sampling of the comments made:<sup>50</sup>

- “The mall roof leakage issue is still the most pressing issue and seems to be improving, but not resolved.”
- “The hotel roof is new and is in excellent condition.”
- “Roof leaks continue to cause interior issues with ceiling and drywall / plaster problems.”
- “The main mall corridor has poor appeal due to the numerous vacancies and dated appearance ...”
- “A new mall / hotel manager has been hired and has been on the job for a few months. This is the latest employee in a long list of managers. The new manager, Ms. Rhonda Bear is a big improvement over prior managers ... Notwithstanding Ms. Bear, the management is still controlled by owner Mr. Nazarian who has shown over the years to be inadequate for the management duties.”
- “Shoppers Drug Mart has recently vacated the mall for their own nearby building. Scotiabank is constructing a new building nearby and will vacate the mall when the new building is available.”

## Scotiabank leaves the Mall in 2011 because of the leaks

The situation at the Scotiabank went from bad to worse during 2011. As mentioned, the bank had left the Mall before the end of the year despite Eastwood's attempts to keep it there. On February 18, 2011, a report entitled "Proposed Branch Relocation, Elliot Lake, ON," prepared by Scotiabank's Real Estate Department, cited a deteriorating building and continuous leaks as reasons for relocation:

Ontario Region, with the support of Real Estate ... recommends relocating our Elliot Lake branch due to a deteriorating mall building that experiences ongoing rooftop water leaks which have adversely impacted our branch and several other retailers. We have incurred repeated damage to our leasehold improvements, frequent temporary closures which are disruptive to customers and operations, and periodic mould damage which is an environmental health risk for staff and customers.<sup>51</sup>

Councillor Collett went to the Scotiabank branch on October 20, 2011, because he was called there by the Fire Department in response to a burning smell. He insisted on being paid in cash before starting to work. Once paid in advance, he discovered that a bucket full of water, up above the lighting, had spilled onto the electrical disconnect and transformer and caused shorting and sparks. He was forced to disconnect the main power, and, as a master electrician, his duty was to phone the Electrical Safety Authority to carry out an inspection. He phoned the authority and understood that it warned the Mall that, as soon as Scotiabank vacated the premises, the situation had to be remedied permanently.<sup>52</sup>

## The Library, which continued to experience leaks in 2011 and 2012, begins to actively explore moving to a new location

On March 14, 2012, Pat McGurk, the chief librarian, sent a letter to Lesley Sprague, the City clerk, asking that a resolution be brought before City Council to allow the Library board to continue to explore the development of a stand-alone library. The Library wanted to vacate the Mall because of the leaks.<sup>53</sup> Council adopted a resolution supporting these efforts, with all but Mayor Hamilton supporting it. Councillor Collett said the support for the motion related to the fact that the Mall continued to leak.<sup>54</sup>

## Zellers was fed up and issued a notice of default

By November 2011, Zellers' management was fed up with the leaks, which still had not been fixed after years of promises to do so.<sup>55</sup> Zellers wrote to Eastwood on November 28, 2011, with formal notice of default on certain leasing obligations, including the fact that the roof had not been properly repaired and continued to leak. Rica Taylor, the real estate property manager with Zellers' parent company, Hudson's Bay Company, described the cumulative situation:

Since May 2007, Zellers Inc. has on numerous occasions advised the Landlord of recurring roof leaks in the Premises, by way of telephone and email, and has repeatedly asked the Landlord to effect whatever repairs may be necessary to stop water from leaking into the Premises. As you are well aware, the roof work that the Landlord has undertaken to rectify this situation to date has proven inadequate, and we continue to experience recurring leaks at numerous locations throughout the store.<sup>56</sup>



## Roof repairs were sporadic and followed the same unsuccessful pattern

Eastwood had no new plans for roof repair other than the usual patching and sealing of cracks. At some point in 2012, it purchased a new type of sealant from the United States, at a cost of \$14,500.<sup>57</sup> Otherwise, Eastwood spent very little on parking deck repair, perhaps no more than \$30,000 in the year preceding the collapse, most of which was charged back to the tenants as common area expenses.<sup>58</sup>

Ms. Bear told the Commission that, during 2011 and 2012, right up to the time of the collapse, the usual patching procedures were used. Mall maintenance staff, not independent professionals, continued to do the work, with the added likelihood that high turnover and understaffing affected the quality and scope compared to previous years.<sup>59</sup>

## March 2012: One more agreement to sell that does not proceed

On March 9, 2012, a numbered company (2266980 Ontario Corp.) entered into a signed agreement of purchase and sale with Eastwood for \$7 million, set to close on June 30, 2012, subject to the due diligence inquiries. Levon Nazarian testified that this offer, which if completed would have been scheduled to close one week after the Mall collapse, was abandoned by the purchaser within the due diligence period because it was concerned about the effects of the Bank of Nova Scotia's departure on rents and the Mall's image.<sup>60</sup>

## April 2012: Mr. Ewald is reminded again of the roof problem and again does nothing

In April 2012, Mr. Ewald was told by the Fire Department that a new material was being used to seal the control joints on the parking deck. Mr. Ewald was concerned that the product created extra weight.<sup>61</sup> On April 30, 2012, he wrote to Ms. Bear, copying Fire Chief Paul Officer, saying that Eastwood needed a permit for this type of repair:

Hi Rhonda, the Ontario Building Code Act requires a permit for any material alteration to a structure or part of a structure. This is a material that is not currently part of the structure and probably is adding additional weight to the roof system. As I understand it this material will be utilized on the required control joints on the roof and a review by an engineer would be required to determine if the added weight poses any issues and what effects this product will have on the control joints.<sup>62</sup>

Mr. Ewald explained that, at the time, he did not understand that Eastwood was actually applying only a new type of caulking. He thought it was a product that had some weight to it.<sup>63</sup> That same day, Mr. Wood and Mr. Saunders sent a letter to Ms. Bear, copying Mr. Ewald, about the product being applied to the roof, saying that the repairs were necessary to protect the structure below and that the application raised no structural concerns:

[O]ngoing parking deck waterproofing repairs are a requirement to protect the structure below. We have no structural concerns over the additional loading of caulking or waterproofing. We would be more concerned about ongoing maintenance not being completed this spring.

...

We trust that the above alleviates any concerns of the City of Elliot Lake. This caulking is a temporary fix until a permanent solution is provided to waterproof this structure.<sup>64</sup>

Mr. Ewald said this letter satisfied his concerns about weight. He agreed that the engineers were saying in this letter that the caulking repairs Eastwood was making were only a temporary solution. He did not take from the letter that the engineers had structural concerns about the building if not waterproofed, but instead that the engineers felt it important that waterproofing repairs get done at that time of the year.<sup>65</sup> He agreed, though, that the engineers were saying in this letter that the caulking was not good enough as a long-term solution. He further agreed that in August 2011 Eastwood had said it wanted to find a long-term solution and that in 2009 he had ordered the leaks to be fixed, but the company had yet to do so. He reiterated that he needed a complaint before he could again order Eastwood to fix the leaks:

Again, the by-law is complaint-driven.

Once we close a file, the file is closed. If someone complains after that, we get it started back up, it starts all over again.<sup>66</sup>

## **June 2012: BDC refinancing is put in place, but it would not have provided enough money for roof to be fixed**

Negotiations with the BDC continued into 2012. In March 2012, the BDC proposed some amendments, including a holdback of the \$55,000 for the purchase of the City land, until an executed agreement of purchase and sale was in place.<sup>67</sup> The new loan, if it had gone through, would have been amortized over 30 years, instead of 10, which would have created significantly more cash flow for Eastwood because monthly mortgage payments would have been significantly less (approximately \$20,000 less per month, according to Levon Nazarian).<sup>68</sup> The amended loan offer also included a provision that stated:

Provide written quotes and/or invoices to support programmed realty improvement of \$445,000 for the realty pledged as security. The budgeted cost should include all necessary roof repairs and resealing of roof membrane to ensure it is waterproof going forward.<sup>69</sup>

Levon Nazarian testified that this condition was later changed to a requirement that Eastwood simply show realty improvements to the Mall of that amount, which he said it did by providing proof of the \$250,000 spent on a new HVAC system; the \$100,000 spent on the Hotel roof; and money spent on painting, remedying *Fire Code* deficiencies, and possibly other repairs. He said the BDC removed the requirement that Eastwood show how it was going to fix the parking deck roof. Levon Nazarian did not have any documents to this effect and never provided any to the Commission despite having been asked to do so. He insisted, though, that the BDC was satisfied on this point at some time before the collapse.<sup>70</sup>

Bob Nazarian testified that the financing was approved and the money to pay off the Royal Bank mortgage was in the possession of the lawyer representing the BDC. He told the Commission that he signed the necessary documents on the Friday before the collapse and the money would have been advanced on Monday, June 25, 2012, but for the collapse.<sup>71</sup> The Royal Bank issued a discharge statement indicating that it would discharge the Computershare mortgage on payment of \$2,631,868, a figure that indicated the bank was not demanding any prepayment penalty and took account of the maintenance reserve fund of \$352,570 into which Eastwood had been required to pay.<sup>72</sup>

According to Bob Nazarian, if the company had received this money, it would have been in a position to proceed with the parking lot and waterproofing projects.<sup>73</sup>

The BDC loan offer required that Eastwood provide proof within six months of the loan being made, by way of a certificate from an engineering firm, that the roof had been waterproofed.<sup>74</sup> Yet before the collapse, and with the approval of the loan so apparently imminent, Eastwood had no contracts in place to do the waterproofing and construction work, nor had it consulted with anybody.<sup>75</sup>

Levon Nazarian insisted the intent was to continue with Philip Sarvinis's revitalization plans to end parking on most of the roof, install a traditional flat roof that could not be parked on, and build a new parking lot on the land to be purchased from the City. (Mr. Sarvinis was the engineer who Eastwood had contacted in 2010.) He agreed that Mr. Sarvinis estimated the cost to be at least \$1.5 million. Even if Eastwood had tried to do the work less expensively, as it no doubt would have, Levon Nazarian agreed it would still have cost something close to that figure.<sup>76</sup>

The BDC loan was \$3.3 million, of which \$2,631,868 would have been used to pay off the Computershare mortgage, leaving only \$668,132. Mr. Sarvinis had actually estimated that the cost of putting a conventional roof on most of the roof deck, putting a thin membrane around the Hotel, and building a new parking lot would have been between \$1.7 million and \$2.1 million.<sup>77</sup> The City was demanding \$55,000 for the land needed for the new lot.

Both Bob and Levon Nazarian agreed that the cash remaining after the BDC loan paid off the Computershare mortgage was only enough money to start the work, but not complete it. Levon Nazarian told the Commission that Eastwood planned on doing the work in stages, but "we hadn't planned that far ahead, sir."<sup>78</sup> He could not even say what the plan was and how the company would accommodate tenant parking needs in the interim: "We had to get this loan from the BDC, get everybody together, negotiate it, see how we could make it work for everybody, and go from there."<sup>79</sup>

Commission counsel suggested to Levon Nazarian that the real plan was to sell, but he insisted this suggestion was not correct and pointed to the amount they spent on consulting costs and the meetings with the City. He called the suggestion "insulting."<sup>80</sup>

I could not disagree more. What is insulting is his categorization of the suggestion. Although Eastwood may have intended to spend some of this money on the roof, Bob Nazarian's track record speaks for itself. Eastwood was at least \$1 million short of the money necessary to do the job correctly. It had no plan and no contracts in place, despite loan approval being apparently imminent. The City land had not yet been purchased. Bob Nazarian had a history of making false statements and baseless promises. For all these reasons, I place no stock in the assertions made by both Bob and Levon Nazarian that they were on the verge of fixing the problem. I can conclude only that Bob Nazarian's plan was to do what he had done since he had bought the Mall – the absolute minimum necessary – while he tried to sell it.

**I place no stock in the assertions made by both Bob and Levon Nazarian that they were on the verge of fixing the problem. I can conclude only that Bob Nazarian's plan was to do what he had done since he had bought the Mall – the absolute minimum necessary – while he tried to sell it.**

Even if Eastwood had proceeded with Mr. Sarvinis's plan, parking would have remained in the area where the Mall eventually collapsed. Nothing Eastwood claimed to be planning could have prevented the collapse.



## Ministry of Labour – involvement with the Mall in 2012 and before

### The Ministry of Labour visited the Mall at least 25 times between 2007 and May 2012

After Ralph Regan retired from the Ministry of Labour in 2005,<sup>81</sup> Elliot Lake did not have a dedicated industrial inspector until the latter part of 2007.\* The new industrial inspector's name was Ed Hudson. He started with the Ministry of Labour in 1984 and retired shortly after the collapse, in October 2012, having worked his whole ministry career as an industrial inspector.<sup>82</sup> Mr. Hudson's area of responsibility stretched from the District of Sudbury across to part of the City of Sault Ste. Marie, with Elliot Lake only a small part of his territory. He was responsible for "hundreds and hundreds of workplaces."<sup>83</sup>

Despite the fact that Mr. Regan had seen evidence of leaks at the Library in 1995 and again in 2005, there was essentially no transfer of this or similar information between Mr. Regan and Mr. Hudson. Nor did Mr. Hudson look up past complaints related to Elliot Lake or the Mall. He was satisfied by the fact that there were no outstanding orders in the Elliot Lake area.<sup>84</sup> Mr. Regan testified that he may have met Mr. Hudson for coffee at some point, but they did not discuss the situation at the Mall.<sup>85</sup>

From 2007 to 2012, Mr. Hudson visited the Algo Centre on 25 different days for more than 30 inspections or follow-ups.<sup>86</sup> With the exception of one visit in January 2012, all Mr. Hudson's visits related to matters not having to do with the leaky parking deck. Following is a list of the businesses visited:

- Foodland on December 4, 2007, and April 15, 2008, in relation to a leaky water pipe<sup>87</sup>
- Peachy's on February 4, 2009<sup>88</sup>
- Elliot Lake Retirement Living on March 24, 2009<sup>89</sup>
- Hungry Jack's on April 2, 2009, to follow up on orders from a December 2008 visit<sup>90</sup>
- Foodland on April 17, 2009, with follow-up on June 2, 2009<sup>91</sup>
- Stella's Place and Allie Katz on June 3, 2009, with follow-up on August 13, 2009<sup>92</sup>
- Shoppers Drug Mart on July 7, 2009, as follow-up to a November 2008 order<sup>93</sup>
- JJ's Pub and Grill on September 17, 2009, with follow-up on October 8, 2009<sup>94</sup>
- Eastwood Mall Inc. on October 9, 2009, with respect to workers on the roof without proper training on fall arrest and use of a scissor lift<sup>95</sup>
- Job Connect on November 26, 2009, in relation to an investigation at a different location<sup>96</sup>
- Chris' Bar and Grill on December 4, 2009, with follow-up on January 13, 2010<sup>97</sup>
- Pet Valu on March 18, 2010<sup>98</sup>
- Interior Solutions on March 18, 2010<sup>99</sup>
- Foodland and Eastwood Mall Inc. on November 17, 2010, and Eastwood Mall Inc. on January 7, 2011, in relation to pipe repairs and repair safety practices<sup>100</sup>

.....

\* Hudson testimony, July 8, 2013, pp. 14763–4. Inspectors from elsewhere may well have conducted inspections in Elliot Lake during this time frame. The record is unclear in this respect.

- Algoma Health Unit on January 7, 2011, and February 9, 2011<sup>101</sup>
- Algo Hotel on June 1, 2011, and August 26, 2011, for routine inspection and follow-up<sup>102</sup>
- Eastwood Mall Inc. on January 11, 2012, in relation to complaints of a leaky roof, faulty escalator, and mould (discussed below)<sup>103</sup>
- Elliot's Not Here on February 8, 2012, April 11, 2012, and May 24, 2012<sup>104</sup>
- Alpine Flowers and Gifts on May 24, 2012<sup>105</sup>

In addition to having visited this wide selection of sites within the Mall, Mr. Hudson recalled staying at the Algo Hotel on two occasions and occasionally eating at the food court during his visits. He entered Zellers as a customer, but never went to the Library or Scotiabank in any capacity.<sup>106</sup>

Mr. Hudson was in the Mall on December 4, 2007, for an investigation at Foodland. This was a particularly bad day for leaks at Zellers. Photos of the store that day (figure 1.12.2) show large numbers of missing ceiling tiles and prominent yellow bladders suspended from the ceiling to catch roof leaks.<sup>107</sup> Mr. Hudson could not recall seeing missing ceiling tiles at any of the times he went into Zellers, and he did not go into the store on this particular day.<sup>108</sup>

If Mr. Hudson had inspected Zellers in December 2007 or January 2008 and asked for the minutes of the Health and Safety Committee, he would have seen references to ceiling leaks and wet, slippery surfaces and indications that the problem was ongoing. He agreed that these references in the minutes would have indicated health and safety issues at the store.<sup>109</sup> Indeed, when shown the minutes' continuing references to an ongoing leaky roof, through 2008 and 2009, he said that, if he had seen these reports or the photos, it would have led him to ask more questions. He would probably also have spoken to the owner and possibly engaged a Ministry of Labour engineer.<sup>110</sup>

Mr. Hudson did not, however, review the Zellers minutes or observe the leaks in December 2007 or on any other day. Indeed, he told the Commission that, on all 25 occasions that he went to the Mall, he did not see any leaks or indications of parking deck leakage, such as tarps, hoses, and buckets.<sup>111</sup> I am skeptical of this assertion from Mr. Hudson, given the evidence I have heard elsewhere of the widespread signs of leakage throughout the Mall. However, I am not able to conclude that Mr. Hudson was misleading the Commission on this point.



**Figure 1.12.2** Conditions in Zellers the day a Ministry of Labour inspector visited the Mall in December 2007

Source Exhibits 12-149, 12-150

## The Ministry of Labour received an anonymous complaint about the roof leaks in December 2011

On December 15, 2011, the Ministry of Labour received an anonymous complaint about the health and safety of the workers at the Mall due to “mold, roof leaking and unsafe escalator.” The matter was assigned to Mr. Hudson.<sup>112</sup> Mr. Hudson inspected the Mall on January 11, 2012.<sup>113</sup> This was his first and only visit to the Mall to deal specifically with the leaking roof.

During his very brief inspection, Mr. Hudson went into the food court area and actually purchased a lottery ticket at the kiosk under the eventual collapse area. His evidence was that he inspected the food court area visually and did not notice any leaking, puddles, buckets, tarps, or hoses. He did not, however, enter any of the businesses to check for leaks, nor did he ask questions of employees. He chose, instead, to go back upstairs to meet directly with the Mall manager, Ms. Bear, in her office.<sup>114</sup>

Mr. Hudson and Ms. Bear briefly discussed cleaning of mould (a topic they had covered in a previous meeting). The conversation then turned to the leaks. Ms. Bear told Mr. Hudson that the roof did in fact leak.<sup>115</sup> However, Mr. Hudson did not ask Ms. Bear how long the problem had existed or where it was occurring. Instead, he was satisfied that the Mall had a maintenance and prevention program and was on top of the issue.<sup>116</sup> He did not ask to meet with any health and safety representatives or to view any minutes of their committee meetings.<sup>117</sup>

In his official report on the visit, Mr. Hudson described the outdoor parking and noted that Eastwood Mall had plans to deal permanently with the leaks in the spring or summer of 2012:

Top floor of most of the mall is outdoor parking to accommodate the needs of the mall & its tenants. Leaks have occurred in the past despite a snow removal program which involves and includes rubber blades

Status:

... On going maintenance program is in place to patch leaks and attempt to identify source location.

... Eastwood Mall are evaluating their options and will be dealing with this problem on a permanent basis spring / summer 2012.”<sup>118</sup>

Despite learning that the roof was leaking, Mr. Hudson did not issue an order of any kind, such as one requiring that the leak be fixed. The following excerpt from his evidence is indicative of his view that a leaky roof was not necessarily a contravention, especially when he was learning of leaks at the Mall for the first time and seeing action on the part of the owners:

Q. Now, why was it that you did not issue an order in this case?

A. Because a roof or something that is leaking is not necessarily a contravention to workers. Again, this was the first time that I had become aware on this day of this roof leaking, period. So my actions or the actions of Ms. Bear and what she was doing with her maintenance program and her continued maintenance program, patching, and what she was going to do was more than satisfactory.<sup>119</sup>

During the January 2012 inspection, Mr. Hudson’s investigation of the complaint about the unsafe escalator was cursory, at best. Essentially, he appears to have noticed that the escalator was running (although he could not say so with certainty) and therefore concluded that it was safe:

Q. Okay, so you satisfied yourself as to the adequacy of your inspection by virtue of the fact that you don’t recall it not working?

A. That is right. I thought ... they were working, that was fine. This whole complaint was anonymous. It was very vague, and it was very first-time only.”<sup>120</sup>



It is worth repeating that the complaint was that the escalator was unsafe, not that it wasn't working. Mr. Hudson clearly did nothing to investigate this aspect of the complaint. Indeed, the Commission learned that, on May 30, 2012, the Technical Standards and Safety Authority actually ordered one of the escalators at the Mall out of service for safety reasons.<sup>121</sup>

Mr. Hudson told the Commission that it had been his intention to follow up on Eastwood Mall's progress in July 2012.<sup>122</sup> He returned to the Mall on other visits before the collapse, including for inspections in April and May 2012, but he did not inquire about whether anything had been done to fix the leakage or whether the leaks persisted. On those occasions, he again said that he did not see evidence of leaks.<sup>123</sup>

Sophie Dennis, the assistant deputy minister (Operations Division) of the Ministry of Labour, was asked to comment on Mr. Hudson's January 2012 visit. She agreed that, in such a case, it would have been good practice for the inspector to get more information by speaking to patrons or workers about the leaks. Similarly, it would have been reasonable to ask questions about the escalators, although it would have been beyond Mr. Hudson's skill-set to actually inspect them.<sup>124</sup>

In contrast, Roger Jeffreys, the provincial engineer for the province, felt Mr. Hudson's visit was adequate, stating that leaks are a frequent occurrence at buildings and are usually fixed. In this case, Mr. Hudson was not aware that the leaking had been going on for 30 years and did not ask more about the leaks because he did not have an idea of the severity of the problem.<sup>125</sup>

I am of the opinion that Mr. Hudson's investigation of this anonymous complaint was perfunctory, incurious, and inadequate. At a minimum, Mr. Hudson should have spent more time looking at other parts of the Mall and asking questions of employees and health and safety representatives at the Mall, rather than going straight to the owner after only a cursory review.

**I am of the opinion that Mr. Hudson's investigation of this anonymous complaint was perfunctory, incurious, and inadequate.**

## **The Ministry of Labour received another complaint about leaks at the Mall – two-and-a half weeks before the collapse**

On June 4, 2012, Robert Comeau, an employee at Zellers in the Mall, sent a complaint about the leaks in the store to the Ministry of Labour's general email address:

I work at the Zellers store in Elliot Lake ON 151 Ontario Ave and we have water leaks in the roof so bad that the lights in some areas kicked off. Buckets are all over the floors and shelves to catch water as well as all through the mall. I believe the air quality is poor as I'm in the store for half an hour when I start to get head aches light headed. When I'm outside i feel better within half hour. I would love to have someone come in and inspect and take air samples as this is an ongoing problem that the mall owner is aware of but seems to do nothing about. For 3 years he says he will fix it but it is getting worse. Could someone help us as I feel my health and my fellow workers health is on the line. Thank you."<sup>126</sup>

On June 5, 2012, Mr. Comeau received the following reply from the Ministry of Labour:

Testing for air quality is the responsibility of the employer or the building owner.

If you have a safety concern that your employer (or the building owner) is unwilling to resolve, then you can call our Health and Safety Contact Centre at 1-877-202-0008 and complain.<sup>127</sup>

Ms. Dennis agreed this was a specific complaint and that the complainant was requesting an inspection. The complaint, she said, should not have been turned back to Mr. Comeau, but should instead have been sent along directly to the Health and Safety Contact Centre mentioned in the reply email.<sup>128</sup> Mr. Comeau actually asked for a follow-up to his email after the collapse at the Algo Mall. On June 24, 2012, he wrote the following email:

Could you reply to my first email about the water leaks and air quality as now the roof came down and would like to see my first email.<sup>129</sup>

The response, which came from the same individual within the Ministry of Labour, was again that Mr. Comeau should contact the Health and Safety Contact Centre himself:

If you want a safety inspector to investigate a complaint, you need to call the Health and Safety Contact Centre ... and ask to speak to an inspector.<sup>130</sup>

Ms. Dennis explained during her testimony that, as a result of this series of emails, the Ministry has changed its process so that complaints of this nature are sent directly to the Contact Centre.<sup>131</sup> Once received by the Contact Centre, the complaint becomes an event and is dispatched into the field; at this point, the receiving office makes an assessment of the urgency of the matter.<sup>132</sup>

The response from the Ministry of Labour employee was obviously inadequate. He twice re-directed Mr. Comeau to the Contact Centre instead of simply putting the complaint through directly. Time and experience will test the sincerity of the Ministry's commitment, expressed by Ms. Dennis, to see that this situation does not happen again.

## **The Algo Mall is inspected one last time before the collapse; the signs of distress are missed once again**

### **Robert Wood is suspended by the Professional Engineers of Ontario but continues to work**

On November 16, 2011, Robert Wood's licence was suspended by the Professional Engineers of Ontario (PEO). The suspension was the result of a disciplinary matter involving errors made by Mr. Wood on the design and calculations for a bridge project.<sup>133</sup> Following his suspension, Mr. Wood continued to work as an engineer with his company, M.R. Wright. Because he was an unlicensed engineer, all reports prepared by him containing professional engineering advice were to be reviewed and signed by a professional engineer, duly licensed in Ontario.<sup>134</sup> No notice was sent to Mr. Wood's clients advising them of his suspension.<sup>135</sup> Mr. Wood did, however, testify that he had advised most of his major clients that he had retired from the practice (he never advised them of his suspension) and was no longer a professional engineer.<sup>136</sup>

During his testimony, Mr. Wood was reluctant to admit to mistakes he may have made. In my view, there were times when, despite the obvious being put before him, he deflected or offered up less than plausible explanations.

In relation to the errors that led to his suspension, despite his plea of guilty on the majority of the allegations against him, Mr. Wood continued to maintain during the Commission hearings that he was right and the PEO was in error for having accused him of mistakes. Mr. Wood relied on the years he spent as a practising professional engineer as the main reason why he was right and the PEO was wrong. He believed the regulator should have simply taken him at his word when he said he was right. He specifically testified that he still felt he was right on the bridge project and that the PEO was wrong in disciplining him. Gregory Saunders, Mr. Wood's former partner,

acknowledged during his testimony before the Commission that mistakes had been made by him and Mr. Wood on the bridge project.<sup>137</sup> I make reference to this troubling attitude, as I believe it to have a significant impact on Mr. Wood's credibility.

Following his suspension, and at the insistence of Mr. Saunders and other professional engineers in the M.R. Wright office, Mr. Wood was not to take on any new clients. Mr. Wood confirmed that he could not sign or send out any reports or drawings if they had not been reviewed and signed by one of the professional engineers in his office. Mr. Wood was required to be supervised by the appropriate engineer within the firm for all his work. The supervising engineer varied from one project to the next, depending on the subject and expertise involved. Mr. Saunders was not always the supervising engineer for the work performed by Mr. Wood. Mr. Wood continued to work in this manner until M.R. Wright was dissolved after the collapse of the Mall.<sup>138</sup>

Despite these requirements, and unbeknownst to Mr. Saunders, Mr. Wood took on a new retainer for Eastwood Mall in 2012 to conduct a building condition survey of the Mall and to draft a report.

## **Robert Wood is retained to complete what would become the final inspection and report on the condition of the Mall before the collapse**

Mr. Wood was hired by Eastwood Mall to do a building condition survey, which was one of the requirements imposed by the BDC in its due diligence process for the loan to Eastwood.<sup>139</sup> This requirement was confirmed by Levon Nazarian and Ms. Bear.<sup>140</sup>

Mr. Wood was aware that the report was being prepared for refinancing purposes. He testified that he had been asked to perform the building condition survey because he was familiar with the Mall, having looked at various areas of concern in 2009. He said his mandate was to perform a follow-up inspection of the areas that had been inspected in 2009 and to do a mechanical and electrical inspection.<sup>141</sup>

## **Robert Wood inspects the structural condition of the Mall**

On April 12, 2012, Mr. Wood arrived at the Algo Mall at 9:00 a.m. to carry out his inspection. He remained there until 2:30 p.m. Terry Neave, a maintenance worker, took him to the areas in the Mall that were of concern. Mr. Wood indicated that he also inspected the areas he had inspected in 2009. In 2012, Zellers remained an area of concern because it was continuing to leak. Mr. Wood did not record any real major concerns in the other areas that had previously been inspected. He did note that some ceiling tiles were missing in the food court.<sup>142</sup>

Mr. Wood started his inspection by reviewing the electrical and mechanical systems. Although he was familiar with much of the mechanical systems from previous inspections, he had not previously looked at the electrical systems.<sup>143</sup> He then proceeded to look at the condition of the structure. Mr. Wood's notes of the inspection are devoted mostly to the electrical and mechanical systems.<sup>144</sup> During his inspection, he noted some of the following conditions:

- Water capture systems had been added in the ceiling space at the Algo Mall.<sup>145</sup>
- The steel of the exterior walkways was rusted and had been painted.<sup>146</sup>
- There was "no visual distress in any areas that could be visually inspected and shown by maintenance."<sup>147</sup>
- There was no loss of section in any of the steel noted as being rusted.

No measurements were taken during the inspection to confirm this last point. Mr. Wood's conclusion was based on his visual assessment of the corrosion.<sup>148</sup>



During his inspection, Mr. Wood made no attempts to uncover any areas in the Mall because he had not seen anything that would have led him to believe he needed to move to the next level, beyond a visual inspection.<sup>149</sup> Drywall and fireproofing were not removed because he was not authorized to remove these materials. In any event, Mr. Wood did not consider the removal of these materials necessary because the areas had been exposed in 2009, when the fireproofing was being replaced, and he had not seen any problems at that time.<sup>150</sup>

Although Mr. Wood looked at some of the beams, he saw little of the structure. He did not inspect any connections because they were covered in fireproofing.<sup>151</sup> Mr. Wood's notes for the structural inspection were approximately one-and-a-half pages long and contained very few details. Despite the observations made during his inspection, Mr. Wood had little to no concerns about the structure of the Mall.

Mr. Wood acknowledged that the addition to the water capture systems would imply that the leakage was worse in 2012 than it had been in 2009. There was no reference in his final report to the fact that the leakage appeared to have worsened. Despite this evidence of continued or increased leakage, Mr. Wood did not recommend that a more comprehensive inspection of the structure be carried out.<sup>152</sup>

In relation to the observation that the rusted steel of the walkways had been painted, Mr. Wood testified that he believed "painted steel" was a good thing and was not concerned that the paint could be disguising the true condition of the steel. He indicated that he believed it was original paint, although he admittedly never confirmed that fact with anyone at the Mall.<sup>153</sup>

I have a great deal of difficulty accepting this explanation. It does not ring true. Mr. Wood was never asked to explain how the paint could be original if there was evidence of rust underneath. Numerous engineers who testified before me stated that the rust would first attack the paint, and then the steel underneath. It seems obvious to me that evidence of rust on the steel with paint overtop would be indicative that it was not the original paint and that the new paint could be masking a deteriorated underlying condition. Mr. Wood appears to have chosen to ignore this logical conclusion and instead presented a less than plausible explanation during his testimony.

I do not believe that Mr. Wood conducted his inspection objectively or with a view to determining the true condition of the Mall. I believe that Mr. Wood undertook the inspection with the preconceived notion that the Mall was structurally sound. His observations and the report that followed speak of someone who started out with the conclusion that the structure was fine and looked for evidence to support that conclusion.

**Clearly, the signs were there and Mr. Wood failed to properly notice them and failed to appreciate the effects of the continued leakage on the structural steel.**

I find it difficult to believe that approximately two months before the collapse there were no visible signs of distress or significant deterioration of the structure. I do not believe that there were no indications to suggest that a more detailed inspection was required because I have heard and seen ample evidence to the contrary. Clearly, the signs were there and Mr. Wood failed to properly notice them and failed to appreciate the effects of the continued leakage on the structural steel.

Throughout his testimony, Mr. Wood seemed altogether indifferent and impenitent when shown evidence of significant or severe corrosion that would have been present during his inspections. I compare Mr. Wood's reaction to that of Brian MacDonald, the project manager of Construction Control; their respective

reactions were at opposite ends of the spectrum. Mr. MacDonald, when confronted with evidence of the deterioration in 2005, when he had conducted his visual inspection, was very upset that he may have missed signs that could have led to a more in-depth inspection at that time, or that someone had potentially covered up the damages caused by the extensive leaking. In contrast, Mr. Wood did not appear to be upset or disturbed by the images of corrosion and the conditions that he missed during his inspection.

## **An Elliot Lake resident documents the condition of the structural steel members – all her observations were missed by an engineer with 40 years' experience**

Although she was not called as a witness, Bonnie Laddell, a resident of Elliot Lake, had taken photographs of various areas of the Mall. She provided those photographs to the Ontario Provincial Police following the collapse. In providing the photographs to the OPP, Ms. Laddell explained that, in the latter part of 2011, she became concerned about the state of the Mall. As a result of her concerns, in February, April, and June 2012 she took photographs of the kiosk area located directly underneath the section of the rooftop parking deck that collapsed, the rooftop parking deck, and the exterior steel support members – all areas that were readily accessible and visible to the public.<sup>154</sup> These photographs were shown to Mr. Wood during his testimony, in view of their having been taken about the same time as his inspection.

Counsel for Mr. Wood objected to his client being examined on these photographs because the exact location of where they were taken had not been identified. I allowed counsel for the Commission to continue examining Mr. Wood and indicated that the missing information would go to the weight to be given to the photographs.<sup>155</sup>

Although the precise locations of where the photographs were taken at the Mall were not identified, I am prepared to accept that these photographs depict a fairly accurate representation of the Mall at or about the time of Mr. Wood's final inspection. There is no doubt that the photographs were taken at the Algo Mall, and no one has disputed that fact. It is also evident that the photographs were taken before the collapse. In addition, the photographs show very similar conditions to those shown in the photographs taken by NORR in July 2012. I accept that the photographs taken by Ms. Laddell are a fair representation of the condition of the Mall at or about the time of Mr. Wood's inspection and, more importantly, that Mr. Wood failed to make note of and report on these conditions.

In reviewing the photographs, Mr. Wood agreed that

- the conditions depicted in Ms. Laddell's photographs included a hole at the base of one of the exterior columns;
- if he had seen similar conditions during his inspection, he would have likely concluded that the structural integrity of the column could be in question; and
- the photographs showed a loss of section (Mr. Wood qualified his acknowledgement by stating that it did not show any failure in the column).<sup>156</sup>

Although Mr. Wood walked the upper walkway, he was not sure he had done a total walkthrough of the lower walkway and indicated that he believed some areas of the lower walkways were inaccessible to the public and to him during his inspection.<sup>157</sup> I believe he made this statement in an attempt to justify why he failed to note the conditions photographed by Ms. Laddell. These photographs appear to have been taken in areas that were easily accessible to the public. I infer that these same areas would have been accessible to Mr. Wood during his inspection; that he failed to go to these areas or to see those conditions during his inspection is further evidence of the fact that his inspection in 2012 was flawed and inadequate. Ms. Laddell was a member of the public, and it is unlikely she was able to gain access to areas that were generally inaccessible to the public in order to take her photographs. I do not accept Mr. Wood's explanation of why he missed these conditions during his inspection.

## The findings and conclusions contained in the May 2012 report

Mr. Wood acknowledged that, despite the notation “Our inspection revealed evidence of rusting on structural steel members in areas where the parking deck is leaking,” the report did not identify how many members had been inspected, or where they were located with reference to the drawings. Mr. Wood confirmed that he had access to the drawings and could have identified the location of the steel members referred to in his report.<sup>158</sup>

Mr. Wood stated that he had intended some urgency in his report when he noted: “A permanent repair needs to be budgeted for to suitably protect the structure.” I do not believe, however, that this statement expresses any urgency; a reader would not be aware of how quickly the repairs needed to be carried out. Mr. Wood admitted during his testimony that the statement did not convey any sense of urgency. “I omitted that unfortunately,” he said.<sup>159</sup>

Mr. Wood confirmed that he provided no detail of where he inspected in order to arrive at the following conclusion found in his report: “It is our opinion that the observed rusting at this time has not detrimentally changed the load carrying capacities of the structure and no visual signs of structural distress were observed.”<sup>160</sup>

The report included photographs of the exterior walkways at the Mall. The captions included with the photographs provided the following descriptions to the reader:

- “Typical oxidized steel beam underside of deck.” (photograph 12);
- “Rusting steel at base of diagonal HSS [hollow structural section] members.” (photograph 13); and
- “Rusting steel underside of deck.” (photograph 14)<sup>161</sup>

Mr. Wood testified that there was definitely extensive rusting on the underside of the outside canopy, which was to be expected. He saw no distress in any of the members, such as visual sagging, and most of the members were covered in paint.<sup>162</sup> He testified that the report summarized that all beams were still structurally sound because there was no reason for him to come to a different conclusion.<sup>163</sup>

There is no other way to describe this report than to say that it was lacking in detail, description, and accuracy. This report was a missed opportunity to identify the serious structural issues that already existed at the Mall at the time.

## Robert Wood meets with Gregory Saunders to review the report

Gregory Saunders is a professional engineer and was a partner of Mr. Woods in M.R. Wright. As noted earlier, as a result of Mr. Wood’s licence suspension he was unable to sign or seal engineering reports. He was, however, able to practise as a “graduate engineer” since he did have an engineering degree. Any report that was required to be issued by a professional engineer, however, had to be reviewed and signed or sealed by a professional engineer. Mr. Saunders did that for reports written by Mr. Wood after his suspension. Mr. Saunders first became aware that Mr. Wood had performed an inspection of the Algo Mall and prepared a report when he was asked to review and sign it.<sup>164</sup>

Mr. Saunders testified that he did not believe that the PEO had an established peer review process. However, it was his understanding that the following generally accepted process had been approved by the PEO:

- The reviewer is to obtain an understanding of the scope of work undertaken for the client.
- The reviewer should take into account the experience of the author.
- The reviewer should feel competent to review and sign the report.
- The reviewer should review photographs taken during the inspection to get a sense of what was going on.



- The reviewer should meet with the author to go through the report and review any data and extra photographs or laboratory results.
- The reviewer should then look at the opinion formulated and, based on the reviewer's own knowledge, determine whether he or she agrees with the author's opinion.<sup>165</sup>

Mr. Saunders testified that, before his review of the May 2012 report, he had never done any work at the Mall and had never been to it.<sup>166</sup>

Although a number of individuals associated with M.R. Wright had gone to the Mall over the years to perform environmental assessments, Mr. Saunders did not recall these previous assessments during his review of the May 2012 report and, therefore, did not read the findings and conclusions that they contained. Mr. Saunders acknowledged that these previous reports were accessible and available for review by all employees of M.R. Wright.<sup>167</sup> He later admitted signing in November 2006 two mould investigation and assessment reports about inspections conducted at Northern Reflections and at the Library. In August 2008, Mr. Saunders signed a third mould investigation and assessment report, this one about an inspection at Zellers.<sup>168</sup>

Before signing the May 2012 report, Mr. Saunders reviewed it and the photographs and had a discussion with Mr. Wood. The whole process took approximately 45 minutes.<sup>169</sup> During his review with Mr. Wood, Mr. Saunders was provided with the following information:

- The report had been prepared for financing purposes.
- Mr. Wood's mandate was to conduct a visual inspection.
- Mr. Wood was led through the Mall by a maintenance worker who identified where the worst leaks were located.
- A number of ceiling tiles were missing in Zellers.
- The yellow tarps and the upside-down umbrellas (as described by Mr. Saunders) were a temporary means of collecting water and sending it to a drain.
- In the areas where the ceiling tiles were missing, Mr. Wood had gone up on a ladder to inspect the conditions and noted insulation was hanging down and a few pipe hangers showed signs of rust.<sup>170</sup>

Mr. Saunders was not provided with a copy of the notes made by Mr. Wood during the inspection.<sup>171</sup>

Mr. Saunders testified that the notes shown to him during the Commission hearings appeared to be a summary and were not typical of Mr. Wood's usual field notes, which were generally more detailed. Mr. Saunders was not aware of whether another set of notes had ever existed.<sup>172</sup> He indicated that, generally, field notes would include an indication of the actual locations inspected, as opposed to general locations; field notes would contain more detail than a summary.<sup>173</sup> Mr. Saunders testified that if these were the only notes taken by Mr. Wood, then they would not meet Mr. Saunders's own standards and would not pass as field notes.<sup>174</sup>

Mr. Wood testified that the notes shown to Mr. Saunders were a summary of the actual notes he took during the inspection. Mr. Wood testified that the original notes had probably been thrown out because he had summarized them.<sup>175</sup>

I am suspicious of Mr. Wood's explanation that the original notes had been thrown out and all that was left was a summary prepared from a set of more detailed notes. In comparing the summary nature of the notes with the final report delivered to the client on May 3, 2012, I am inclined to believe that these were the only notes taken by Mr. Wood and these were his actual field notes. Mr. Wood most likely viewed this inspection as a cursory overview of the state of the building and did not think that he needed to take an in-depth look at the building because he was already familiar with the structure.

Mr. Saunders confirmed that, based on his conversation with Mr. Wood, he had no reason to believe that he was not receiving accurate responses to his questions or that his field notes would contain different information.<sup>176</sup>

During their meeting, Mr. Saunders and Mr. Wood reviewed the degree of rust that had been noted. Mr. Wood told Mr. Saunders that the observed rust was surface rust and that, in his (Mr. Wood's) opinion, there was no loss of section. Mr. Saunders was not in a position to make his own determination from the photographs and relied on Mr. Wood's opinion.<sup>177</sup> Mr. Saunders and Mr. Wood reviewed the photograph of the heavily oxidized beam. Mr. Wood explained to Mr. Saunders that a lot of effervescence was caused by salt buildup from the chlorides leaking through the parking deck. Mr. Saunders was told that the beam had oxidized but that, in Mr. Wood's opinion, there was little loss of section.<sup>178</sup>

### **Robert Wood fails to advise Gregory Saunders of the previous Order to Comply and the October 2009 structural condition report**

When Mr. Wood asked Mr. Saunders to review the report, he failed to provide him with the following information:

- The Mall had a history of long-standing leaking and structural problems.
- A previous report on the structural condition of the Mall had been prepared by Mr. Wood in October 2009.
- The City of Elliot Lake had issued an Order to Comply dated September 25, 2009, which stated that "[a]n inspection has revealed damaged fire proofing materials and/or excessive rust due to long term water infiltration on structural steel beams."<sup>179</sup>

Mr. Saunders testified that if he had been told about the Order to Comply and the October 2009 structural condition report, both of which showed a history of the concern with the steel and the rooftop parking and evidence that the leakage had been going on for a while,<sup>180</sup> it likely would have changed his approach. In particular:

- If he had seen the September 25, 2009, Order to Comply, it would have raised questions about the condition of the Mall and he would have asked how long the Mall had been leaking.<sup>181</sup>
- A review of picture 6 included in the October 2009 report entitled "Exposed underside of right parking area"<sup>182</sup> may have caused him concern because it showed effervescence created by saltwater. Although seeing this photograph may not have stopped him from signing the May 2012 report, it would have caused him to ask more questions of Mr. Wood.<sup>183</sup>
- He would have suggested that further investigations be carried out and likely would not have signed the report until these investigations had been completed and he felt confident in the results.<sup>184</sup>
- He likely would not have permitted anyone from M.R. Wright to be involved in a simple visual inspection of the Mall in 2012, in light of the existence and content of the October 2009 report.<sup>185</sup>

Mr. Saunders testified that knowing about the October 2009 report at the time of his review of the May 2012 report would have raised red flags. He would have been concerned about the "degree of inspection" that had been carried out in 2012.<sup>186</sup>

Mr. Saunders stated that, had he been provided with all the information, he would have suggested carrying out additional or more comprehensive testing. He indicated that the more comprehensive testing would have included removal of ceiling tiles in leakage areas and taking a closer look at the leaks. It would have also included checking the connections and carrying out a more comprehensive investigation of the structural elements, something beyond a simple visual inspection.<sup>187</sup>

Mr. Saunders confirmed that, at the time he signed the May 2012 report, he had no reason to question Mr. Wood's ability to observe and report back the relevant information required for Mr. Saunders to complete his review. He testified that Mr. Wood was a structural engineer who often dealt with deteriorating beams and columns and had been doing that type of work for 40 years. In Mr. Saunders's opinion, Mr. Wood was one of the most respected structural engineers in Sault Ste. Marie and, possibly, Northern Ontario. He confirmed that, based on the information provided to him, there was nothing to indicate that Mr. Wood was not reporting accurately on observations he had made during an inspection, or that he did not perform a competent visual review of the Mall.<sup>188</sup>

Mr. Saunders testified that he signed the report based on Mr. Wood's 40 years of experience spent looking at steel, his own experience, the information provided by Mr. Wood, and the photographs shown to him.<sup>189</sup>

I accept that Mr. Saunders was not provided with a full picture of the history and condition of the Mall before signing the report. However, Mr. Saunders had at his disposal copies of the previous reports conducted at the Mall. He made no effort to look through the files in his office to determine whether any previous reports relating to the Mall had been prepared. Mr. Wood, however, should have specifically advised Mr. Saunders of the existence of the October 2009 report. Mr. Saunders relied on Mr. Wood and trusted him to provide all the information required so that he could sign the report. Nonetheless, given Mr. Wood's status as a suspended engineer and his unwillingness to acknowledge errors that had been made on the bridge project (despite his guilty plea), Mr. Saunders should have approached the review with a more critical eye and should have been less willing to accept Mr. Wood at his word.

## Robert Wood changes the report at the request of Bob Nazarian

Ms. Bear acknowledged that she would have been the one to receive the May 3, 2012, report, sent by Mr. Saunders.<sup>190</sup> She then forwarded the report to Bob Nazarian.<sup>191</sup>

The original report signed by Mr. Saunders included the photograph in Zellers showing the leakage-collection system and the photograph of the highly oxidized bottom flange.<sup>192</sup> It also included this sentence in the third paragraph from the bottom, which read:

All beams inspected had little loss of section and we would consider the members still structurally sound. The ongoing leakage from the parking deck is of particular concern in the areas of Zellers, and the expansion joint along the south wall of the Algo Inn, over the municipal library.<sup>193</sup>

Following his review of the original report, Bob Nazarian was of the opinion that two of the photographs in the report showed nothing of significance and asked Ms. Bear to have them removed,<sup>194</sup> the photo with the caption "Zellers ceiling below parking deck, Leakage collection system"; and the other, with the caption "Heavily oxidized bottom flange of parking deck beams in Zellers, no significant loss of section at this time."<sup>195</sup> Ms. Bear testified that Mr. Nazarian wanted those photographs removed because they did not relate to anything, they did not add any value to the report, and they were ugly photographs. Bob Nazarian confirmed the evidence given by Ms. Bear and testified that he discussed the photographs and some of the wording with Levon Nazarian. They decided they would ask Mr. Wood if it would be possible to remove the photographs or change them. Bob Nazarian acknowledged that the changes were requested to make the report more appealing and help Eastwood get a new mortgage. He confirmed that Mr. Wood was asked to remove the photograph of a rusted beam and the one of the tarps in Zellers. He also confirmed that a subsequent request was made to Mr. Wood to remove the word "ongoing." Bob Nazarian believed the report provided to him was a draft and open to his feedback. He acknowledged that the word "Draft" did not appear anywhere on the report.<sup>196</sup>



I do not accept that Mr. Bob Nazarian wanted those photographs removed simply because they were “ugly photographs.” I am more inclined to believe that Mr. Nazarian wanted the photographs removed because he knew they showed the deteriorated condition of the Mall and showed that the structure could be compromised because of the leaks and the corrosion, and likely would have jeopardized his financing.

In addition to making the request that two photographs be excised from the report, Bob Nazarian did not like the wording included in the third paragraph of the report.<sup>197</sup> Ms. Bear testified that he felt that the use of the expression “particular concern,” when combined with “little loss of section” and “structurally sound,” was contradictory. Mr. Nazarian asked that “particular concern” be removed from the report. Following his instructions, she sent an email to Mr. Wood asking that the expression be removed. Mr. Wood was also asked to remove the word “ongoing.” Ms. Bear confirmed that the words were removed from the report. She did not recall whether Mr. Wood had asked her why she wanted these words removed.<sup>198</sup>

Levon Nazarian testified that he was “actually extremely satisfied” when he received the report because, despite the piece of concrete that had fallen several months before in Hungry Jack’s, the report stated that the building “was structurally sound and the load-bearing capacity had not been affected in any way.” Levon Nazarian testified that Ms. Bear brought up the subject of the changes. He asked Ms. Bear if the words “ongoing” and “particular concern” were relevant; if they weren’t, he wanted them removed. He testified that he wanted to present a better report to the bank. He did not believe that removing the word “ongoing” was misleading because the BDC already knew the leaks had been occurring for some time, which was the reason financing was being obtained. He stated that, if Mr. Wood had refused to remove the words, he would not have had a problem with the report. He agreed that removing “ongoing” deprived the reader, without prior knowledge of the leaks, of the benefit of knowing that the leaks had been occurring for some time. He further agreed that removing the words “particular concern” would deprive the reader of knowing that the engineer was particularly concerned about the leaks in Zellers and the expansion joint in the Library.<sup>199</sup>

Levon Nazarian did not have any concerns with the photographs of the tarps in Zellers and the rusted beam but, on his father’s advice, determined that they were not very presentable. He acknowledged speaking to Ms. Bear about removing them, and he testified that it was Ms. Bear who discussed these matters with Mr. Wood. He also acknowledged that the rust on the beam in the photograph did not look like surface rusting – and the report spoke only of surface rusting. He testified that he asked that the photograph of the tarps be removed because he did not think the tarps were relevant to any structural issues. Levon Nazarian acknowledged that he was aware that rust, if severe enough, could cause structural problems. He also acknowledged that he asked that both photographs be removed to make the report more presentable to the bank.<sup>200</sup>

Mr. Wood confirmed that he was asked to make changes after the report was signed. He testified that Ms. Bear contacted him and indicated that Bob Nazarian was unhappy with the inclusion of the photograph showing the yellow tarps hanging in Zellers because those tarps did not relate to any structural issues; he wanted it removed, as well as the one of the heavily oxidized flange of the beam in Zellers. Ms. Bear also indicated to Mr. Wood that waterproofing was being carried out at the Mall and that the tarps would be removed.<sup>201</sup> Mr. Wood testified that, in his opinion, removing the photographs did not change the substance of the report and the tarps were something that Bob Nazarian had indicated were going to be removed.<sup>202</sup>

Mr. Wood denied being aware that the Mall had been leaking over a long period and said he relied on the representations from Eastwood that the leaks were going to be fixed.<sup>203</sup> This statement flies in the face of the fact that he was aware the Mall was leaking since at least 2009 and that it was continuing to leak, as noted in his May 2012 inspection.<sup>204</sup> He had evidence that the leaks had not been fixed in the three years since his last inspection. I am not inclined to believe that Mr. Wood was unaware that the Mall had been leaking for a long

period. I find it simply incredible that, despite his many years of experience, he failed to appreciate the effect of prolonged leaking on the structural steel.

In accordance with the wording changes requested by Bob and Levon Nazarian, the third paragraph of the report was amended to read:

All beams inspected had little loss of section and we would consider the members still structurally sound. The leakage through the parking deck has caused surface rusting of the structural steel in the areas of Zellers, and the expansion joint located along the south wall of the Algo Inn, over the municipal library.<sup>205</sup>

Mr. Wood disagreed that removing the words “ongoing” and “particular concern” misrepresented the actual condition of the Mall to anyone who would be looking at the report. He testified that the report did not misrepresent the condition of the Mall because his conclusion was that the rust that had been observed was surface rust.<sup>206</sup>

Mr. Wood ultimately agreed that the mortgage company was entitled to know that leakage-collection systems had been installed at the Mall, that there was a rusted beam, and that, by removing these photographs, he prevented the mortgage company from making its own determination of the condition of the Mall.<sup>207</sup>

The BDC received the version of the report with the words “ongoing” and “particular concern” removed. Although the report did not have the photograph of the tarps in Zellers, it still included the photograph of the rusted beam. Levon Nazarian agreed he was the one who sent the report to the bank. He did not know why the version sent to the bank still included the photograph of the rusted beam and believed it had been left in by mistake. Levon Nazarian testified that he did not tell the bank that the report had been changed.<sup>208</sup>

### **Gregory Saunders is unaware of the changes to the report and is not asked to sign an amended report**

Mr. Saunders testified that none of the changes to the report were discussed with him.<sup>209</sup> Mr. Wood acknowledged making the changes to the May 3, 2012, report and that Mr. Saunders was not a party to the changes or aware of them. He did not seek Mr. Saunders’s permission before changing the report.<sup>210</sup>

Mr. Wood confirmed that, after the changes were made to the report, he took the signature page from the original report signed by Mr. Saunders and attached it to the amended report. Mr. Wood agreed that the recipient of the amended report would have no way of knowing that Mr. Saunders had not actually signed the amended report.<sup>211</sup>

Mr. Saunders testified that he would not have agreed to the changes to the wording or the removal of the photographs from the report. He explained that, although the amended report provided the same opinion, it did not give an accurate picture of the conditions seen in the Mall. Mr. Saunders confirmed that he regarded changing the document after it was signed as unprofessional behaviour. He further testified that removing text and photographs raises red flags<sup>212</sup> and could mislead the ultimate recipient of the report about the actual condition of the Mall. He also testified that the amended report no longer provided an accurate depiction of what had been seen in the Mall.<sup>213</sup>

I agree with Mr. Saunders’s conclusions regarding the effect of the changes to the report as well as his view that it was unprofessional for Mr. Wood to have done so without his (Mr. Saunders’s) knowledge and approval.

## Notes

- <sup>1</sup> Quinte testimony, July 31, 2013, pp. 19416–17.
- <sup>2</sup> Quinte testimony, July 31, 2013, pp. 19420–1.
- <sup>3</sup> Quinte testimony, July 31, 2013, pp. 19432–68.
- <sup>4</sup> Quinte testimony, July 31, 2013, pp. 19432–68; Exhibit 2359.
- <sup>5</sup> Quinte testimony, July 31, 2013, pp. 19432–68.
- <sup>6</sup> Bear testimony, June 11, 2013, pp. 13995–14002.
- <sup>7</sup> Hudson testimony, July 8, 2013, pp. 14809–10; Quinte testimony, August 1, 2013, p. 19516.
- <sup>8</sup> Quinte testimony, July 31, 2013, p. 19441.
- <sup>9</sup> Bear testimony, June 11, 2013, pp. 13995–14002.
- <sup>10</sup> Bear testimony, June 11, 2013, pp. 13995–14002.
- <sup>11</sup> Bear testimony, June 11, 2013, pp. 14064–5.
- <sup>12</sup> Bear testimony, June 11, 2013, pp. 14100–4.
- <sup>13</sup> Bob Nazarian testimony, July 26, 2013, pp. 18513–21; Bear testimony, June 11, 2013, pp. 13995–14002.
- <sup>14</sup> Bob Nazarian testimony, July 26, 2013, pp. 18513–21.
- <sup>15</sup> Bob Nazarian testimony, July 26, 2013, pp. 18513–21; Levon Nazarian testimony, July 18, 2013, pp. 17299–306.
- <sup>16</sup> Bear testimony, August 6, 2013, pp. 19607–40.
- <sup>17</sup> Bear testimony, June 11, 2013, pp. 13995–14002.
- <sup>18</sup> Bear testimony, June 11, 2013, pp. 14049–60.
- <sup>19</sup> Wood testimony, June 7, 2013, pp. 13437–8.
- <sup>20</sup> Bob Nazarian testimony, July 26, 2013, pp. 18513–21.
- <sup>21</sup> Levon Nazarian testimony, July 18, 2013, pp. 17299–306.
- <sup>22</sup> Levon Nazarian testimony, July 18, 2013, pp. 17334–42.
- <sup>23</sup> Levon Nazarian testimony, July 18, 2013, pp. 17309–19.
- <sup>24</sup> Levon Nazarian testimony, July 18, 2013, pp. 17334–42.
- <sup>25</sup> Levon Nazarian testimony, July 18, 2013, pp. 17299–306.
- <sup>26</sup> Quinte testimony, July 31, 2013, pp. 19460, 19495–9; August 1, 2013, pp. 19520–6.
- <sup>27</sup> Quinte testimony, July 31, 2013; pp. 19440–68.
- <sup>28</sup> Quinte testimony, July 31, 2013, pp. 19440–68.
- <sup>29</sup> Quinte testimony, July 31, 2013, pp. 19495–9.
- <sup>30</sup> Collett testimony, May 24, 2013, pp. 11345–8.
- <sup>31</sup> Collett testimony, May 23, 2013, pp. 11077–8; May 24, 2013, pp. 11345–8.
- <sup>32</sup> Collett testimony, May 23, 2013, pp. 11374–5.
- <sup>33</sup> Collett testimony, May 24, 2013, pp. 11359–62.
- <sup>34</sup> Collett testimony, May 24, 2013, pp. 11414–15.
- <sup>35</sup> Hamilton testimony, July 10, 2013, pp. 15373–6.
- <sup>36</sup> Ewald testimony, May 27, 2013, pp. 11766–8.
- <sup>37</sup> Ewald testimony, May 27, 2013, pp. 11839–41.
- <sup>38</sup> Ewald testimony, May 27, 2013, pp. 11769–71.
- <sup>39</sup> Ewald testimony, May 27, 2013, pp. 11766–73.
- <sup>40</sup> Ewald testimony, May 27, 2013, p. 11772.
- <sup>41</sup> Exhibit 10, para 12.
- <sup>42</sup> Exhibit 10, para 13.
- <sup>43</sup> Exhibit 10, para 15.
- <sup>44</sup> Exhibit 10, para 16.
- <sup>45</sup> See Exhibit 10, generally.
- <sup>46</sup> Exhibit 10, paras 30–5.
- <sup>47</sup> Quinte testimony, July 31, 2013, pp. 19468–75.
- <sup>48</sup> Collett testimony, May 23, 2013, pp. 11074–5.
- <sup>49</sup> Exhibit 10 at para 36–42.
- <sup>50</sup> Exhibit 1424.
- <sup>51</sup> Exhibit 13, para 54.
- <sup>52</sup> Collett testimony, May 23, 2013, pp. 11066–71; McCulloch testimony, June 13, 2013, pp. 14489–92.
- <sup>53</sup> Exhibit 11-249; Hamilton testimony, July 10, 2013, pp. 15468–70.
- <sup>54</sup> Exhibit 11-250; Collett testimony, May 24, 2013, pp. 11314–17; Hamilton testimony, July 10, 2013, pp. 15367–71; Exhibits 5844, 5845, 11.
- <sup>55</sup> Cuthbertson testimony, May 1, 2013, pp. 7889–90.
- <sup>56</sup> Exhibit 12-91; see also Exhibit 12 for a thorough description of the problems with leaks at Zellers during the Eastwood years of ownership.
- <sup>57</sup> Levon Nazarian testimony, July 17, 2013, pp. 16965–6; Exhibit 5332; Fabris testimony, July 11, 2013, p. 15684; Bear testimony, June 11, 2013, pp. 13949–51; Fabris testimony, July 12, 2013, pp. 15932–3.
- <sup>58</sup> Bear testimony, June 11, 2013, pp. 13988–93; Bear testimony, June 12, 2013, pp. 14093–4; Exhibits 4955, 4976.
- <sup>59</sup> Bear testimony, June 11, 2013, pp. 13956–7; Exhibit 5042.
- <sup>60</sup> Levon Nazarian testimony, July 17, 2013, pp. 16941–3; Exhibits 1255, 1505.
- <sup>61</sup> Officer testimony, April 22, 2013, pp. 6201–5.
- <sup>62</sup> Exhibit 300.
- <sup>63</sup> Ewald testimony, May 27, 2013, p. 11755.
- <sup>64</sup> Exhibit 300.
- <sup>65</sup> Ewald testimony, May 27, 2013, pp. 11759–61.
- <sup>66</sup> Ewald testimony, May 27, 2013, pp. 11761–4.
- <sup>67</sup> Exhibit 1310.
- <sup>68</sup> Exhibit 1310; Levon Nazarian testimony, July 17, 2013, pp. 16962–4.
- <sup>69</sup> Exhibit 1310.
- <sup>70</sup> Levon Nazarian testimony, July 17, 2013, pp. 16968–71; Levon Nazarian testimony, July 18, 2013, pp. 17411–13; Exhibit 1595.
- <sup>71</sup> Bob Nazarian testimony, July 29, 2013, pp. 18682–3.
- <sup>72</sup> Exhibit 1251.
- <sup>73</sup> Bob Nazarian testimony, July 29, 2013, pp. 18682–7; Exhibit 1251.
- <sup>74</sup> Exhibit 1310.
- <sup>75</sup> Levon Nazarian testimony, July 17, 2013, pp. 16972–4.
- <sup>76</sup> Levon Nazarian testimony, July 17, 2013, pp. 16972–4.
- <sup>77</sup> Exhibits 728, 5685.
- <sup>78</sup> Levon Nazarian testimony, July 17, 2013, pp. 16972–4; Bob Nazarian testimony, July 29, 2013, pp. 18684–5.
- <sup>79</sup> Levon Nazarian testimony, July 17, 2013, p. 16978; Bob Nazarian testimony, July 29, 2013, p. 18865.
- <sup>80</sup> Levon Nazarian testimony, July 17, 2013, pp. 16980–1.
- <sup>81</sup> Regan testimony, June 5, 2013, pp. 13041–2.
- <sup>82</sup> Hudson testimony, July 8, 2013, pp. 14729–30.
- <sup>83</sup> Hudson testimony, July 8, 2013, p. 14763.
- <sup>84</sup> Regan testimony, June 5, 2013, p. 13042; Hudson testimony, July 8, 2013, pp. 14762–4.
- <sup>85</sup> Regan testimony, June 5, 2013, p. 13042.
- <sup>86</sup> Hudson testimony, July 8, 2013, p. 14769.
- <sup>87</sup> Exhibit 3880.
- <sup>88</sup> Exhibit 3880.
- <sup>89</sup> Exhibit 3880.
- <sup>90</sup> Exhibit 3853; Quinte testimony, August 1, 2013, pp. 19513–16.
- <sup>91</sup> Exhibit 3853.
- <sup>92</sup> Exhibit 3853.
- <sup>93</sup> Exhibit 3853.
- <sup>94</sup> Exhibit 3853.
- <sup>95</sup> Exhibit 3853.
- <sup>96</sup> Exhibit 3853.
- <sup>97</sup> Exhibit 3853.
- <sup>98</sup> Exhibit 3853.
- <sup>99</sup> Exhibit 3853.



- <sup>100</sup> Exhibits 3880, 3853.
- <sup>101</sup> Exhibit 3853.
- <sup>102</sup> Exhibit 3880.
- <sup>103</sup> Exhibit 3880.
- <sup>104</sup> Exhibit 3853.
- <sup>105</sup> Exhibit 3853.
- <sup>106</sup> Hudson testimony, July 8, 2013, pp. 14770–1.
- <sup>107</sup> Exhibits 12-149, 12-150, 12-24, 12-109.
- <sup>108</sup> Hudson testimony, July 8, 2013, p. 14777.
- <sup>109</sup> Hudson testimony, July 8, 2013, pp. 14777–78.
- <sup>110</sup> Hudson testimony, July 8, 2013, pp. 14778–82.
- <sup>111</sup> Hudson testimony, July 8, 2013, pp. 14818–19, 14775–7, 14786–7, 14884; Exhibits 3852, 12-109, 12-149, 12-150, 12-24.
- <sup>112</sup> Exhibit 749.
- <sup>113</sup> Exhibit 1438.
- <sup>114</sup> Hudson testimony, July 8, 2013, pp. 14818–19; Exhibit 3880.
- <sup>115</sup> Hudson testimony, July 8, 2013, pp. 14821–2.
- <sup>116</sup> Hudson testimony, July 8, 2013, pp. 14833–4.
- <sup>117</sup> Bear testimony, June 11, 2013, pp. 14014–15; Exhibit 3880.
- <sup>118</sup> Exhibit 1438.
- <sup>119</sup> Hudson testimony, July 8, 2013, p. 14884.
- <sup>120</sup> Hudson testimony, July 8, 2013, p. 14821; Exhibit 3880.
- <sup>121</sup> Bear testimony, June 11, 2013, pp. 14010–11.
- <sup>122</sup> Hudson testimony, July 8, 2013, p. 14834.
- <sup>123</sup> Hudson testimony, July 8, 2013, pp. 14835–6.
- <sup>124</sup> Dennis testimony, April 30, 2013, pp. 7538–9.
- <sup>125</sup> Jeffreys testimony, July 31, 2013, pp. 19294–5.
- <sup>126</sup> Exhibit 12-95.
- <sup>127</sup> Exhibit 12-95.
- <sup>128</sup> Dennis testimony, April 30, 2013, pp. 7559–60.
- <sup>129</sup> Exhibit 12-95.
- <sup>130</sup> Exhibit 12-95.
- <sup>131</sup> Dennis testimony, April 30, 2013, p. 7562.
- <sup>132</sup> Dennis testimony, May 1, 2013, pp. 7639–47.
- <sup>133</sup> Wood testimony, June 7, 2013, pp. 13360–1, 13363; Exhibit 5241.
- <sup>134</sup> Saunders testimony, June 6, 2013, pp. 13103–5; Wood testimony, June 6, 2013, p. 13244.
- <sup>135</sup> Saunders testimony, June 6, 2013, pp. 13111–12.
- <sup>136</sup> Wood testimony, June 7, 2013, pp. 13466–7.
- <sup>137</sup> Wood testimony, June 7, 2013, pp. 13360–1; Saunders testimony, June 6, 2013, pp. 13110–11; Exhibit 5237.
- <sup>138</sup> Wood testimony, June 7, 2013, pp. 13467–9; Saunders testimony, June 6, 2013, p. 13089.
- <sup>139</sup> Levon Nazarian testimony, July 18, 2013, pp. 17291–8; Exhibit 5244.
- <sup>140</sup> Levon Nazarian testimony, July 15, 2013, pp. 16302–15; Bear testimony, June 11, 2013, pp. 13958–66.
- <sup>141</sup> Wood testimony, June 7, 2013, p. 13364.
- <sup>142</sup> Wood testimony, June 7, 2013, pp. 13367–9; Exhibit 5007.
- <sup>143</sup> Wood testimony, June 7, 2013, pp. 13369–70.
- <sup>144</sup> Exhibit 5007, p. 011.
- <sup>145</sup> Wood testimony, June 7, 2013, pp. 13362–72; Exhibit 5007, p. 011.
- <sup>146</sup> Wood testimony, June 7, 2013, pp. 13374–5; Exhibit 5007, p. 012.
- <sup>147</sup> Wood testimony, June 7, 2013, pp. 13375–6; Exhibit 5007, p. 012.
- <sup>148</sup> Wood testimony, June 7, 2013, p. 13380; Exhibit 110.
- <sup>149</sup> Wood testimony, June 7, 2013, p. 13381.
- <sup>150</sup> Wood testimony, June 7, 2013, p. 13382.
- <sup>151</sup> Wood testimony, June 7, 2013, pp. 13382–3.
- <sup>152</sup> Wood testimony, June 7, 2013, pp. 13362–73; Exhibit 110.
- <sup>153</sup> Wood testimony, June 7, 2013, pp. 13374–5.
- <sup>154</sup> Exhibit 10-53: OPP\_E000002339, pp. 18–20. 27.
- <sup>155</sup> Wood testimony, June 7, 2013, pp. 13517–19.
- <sup>156</sup> Wood testimony, June 7, 2013, pp. 13515–19; Exhibit 10-53: OPP\_E000002339, pp. 18–20. 27.
- <sup>157</sup> Wood testimony, June 7, 2013, p. 13531.
- <sup>158</sup> Wood testimony, June 7, 2013, pp. 13377–8; Exhibit 110.
- <sup>159</sup> Wood testimony, June 7, 2013, pp. 13378–9; Exhibit 110.
- <sup>160</sup> Wood testimony, June 7, 2013, p. 13379; Exhibit 110.
- <sup>161</sup> Exhibit 110.
- <sup>162</sup> Wood testimony, June 7, 2013, pp. 13513–14.
- <sup>163</sup> Wood testimony, June 7, 2013, pp. 13379–80.
- <sup>164</sup> Saunders testimony, June 6, 2013, pp. 13130–1; Exhibit 111.
- <sup>165</sup> Saunders testimony, June 6, 2013, pp. 13163–4.
- <sup>166</sup> Saunders testimony, June 6, 2013, pp. 13079–80.
- <sup>167</sup> Saunders testimony, June 6, 2013, pp. 13112–22.
- <sup>168</sup> Exhibits 10-91, 325. 12-120; Saunders testimony, June 6, 2013, pp. 13117–30.
- <sup>169</sup> Saunders testimony, June 6, 2013, pp. 13144–6, 13149.
- <sup>170</sup> Saunders testimony, June 6, 2013, pp. 13146–7; Wood testimony, June 7, 2013, pp. 13471–2.
- <sup>171</sup> Saunders testimony, June 6, 2013, p. 13157; Exhibit 5007.
- <sup>172</sup> Saunders testimony, June 6, 2013, p. 13157; Exhibit 5007.
- <sup>173</sup> Saunders testimony, June 6, 2013, p. 13160.
- <sup>174</sup> Saunders testimony, June 6, 2013, p. 13161.
- <sup>175</sup> Wood testimony, June 6, 2013, p. 13366.
- <sup>176</sup> Saunders testimony, June 6, 2013, p. 13194.
- <sup>177</sup> Saunders testimony, June 6, 2013, pp. 13147–8; Wood testimony, June 7, 2013, pp. 13475–6.
- <sup>178</sup> Saunders testimony, June 6, 2013, p. 13195.
- <sup>179</sup> Saunders testimony, June 6, 2013, pp. 13131–6; Exhibit 102, pp. 004–6.
- <sup>180</sup> Saunders testimony, June 6, 2013, pp. 13196–8.
- <sup>181</sup> Saunders testimony, June 6, 2013, pp. 13136–7.
- <sup>182</sup> Exhibit 102, p. 017.
- <sup>183</sup> Saunders testimony, June 6, 2013, p. 13143.
- <sup>184</sup> Saunders testimony, June 6, 2013, p. 13197.
- <sup>185</sup> Saunders testimony, June 6, 2013, p. 13197.
- <sup>186</sup> Saunders testimony, June 6, 2013, pp. 13196–8.
- <sup>187</sup> Saunders testimony, June 6, 2013, pp. 13168–9.
- <sup>188</sup> Saunders testimony, June 6, 2013, pp. 13191–2.
- <sup>189</sup> Saunders testimony June 6, 2013, p. 13149; Wood testimony, June 7, 2013, pp. 13480–1; Exhibits 110, 111, 796.
- <sup>190</sup> Bear testimony, June 11, 2013, pp. 13958–66; Saunders testimony, June 6, 2013, pp. 13150–2.
- <sup>191</sup> Bear testimony, June 11, 2013, pp. 13958–66.
- <sup>192</sup> Saunders testimony, June 6, 2013, pp. 13150–2; Wood testimony, June 7, 2013, p. 13391; Exhibit 111.
- <sup>193</sup> Saunders testimony, June 6, 2013, pp. 13172–7; Exhibit 111.
- <sup>194</sup> Bear testimony, June 11, 2013, pp. 13958–66.
- <sup>195</sup> Bear testimony, June 11, 2013, pp. 13958–66; Exhibit 114.
- <sup>196</sup> Bob Nazarian testimony, July 23, 2013, pp. 17545–55; Exhibits 5250, 6174.
- <sup>197</sup> Bear testimony, June 11, 2013, pp. 13958–66; Exhibit 114.
- <sup>198</sup> Bear testimony, June 11, 2013, pp. 13958–66; Exhibits 114, 5333, 5334.
- <sup>199</sup> Levon Nazarian testimony, July 15, 2013, pp. 16302–15; Exhibits 5250, 6174.
- <sup>200</sup> Levon Nazarian testimony, July 15, 2013, pp. 16316–22; Exhibit 6174.
- <sup>201</sup> Wood testimony, June 7, 2013, pp. 13386–7; Exhibit 110.

<sup>202</sup> Wood testimony, June 7, 2013, pp. 13391–3.

<sup>203</sup> Wood testimony, June 7, 2013, pp. 13442–3, 13387; Exhibit 110.

<sup>204</sup> Exhibit 5007, p. 012.

<sup>205</sup> Exhibit 796.

<sup>206</sup> Wood testimony, June 7, 2013, pp. 13395–6.

<sup>207</sup> Wood testimony, June 7, 2013, pp. 13396–7.

<sup>208</sup> Levon Nazarian testimony, July 15, 2013, pp. 16332–36; Exhibit 6176.

<sup>209</sup> Saunders testimony, June 6, 2013, pp. 13172–7.

<sup>210</sup> Wood testimony, June 7, 2013, p. 13483.

<sup>211</sup> Wood testimony, June 7, 2013, pp. 13483–4, Exhibit 796.

<sup>212</sup> Saunders testimony, June 6, 2013, pp. 13180–1.

<sup>213</sup> Saunders testimony, June 6, 2013, p. 13182.

SECTION

# VI

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## General Conclusions and Recommendations



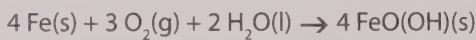
*The deterioration of the infrastructure of the Mall parking deck did not happen overnight. It was the result of a poorly conceived and poorly engineered surface, decades of neglect, lack of competent and thorough inspection, inadequate official oversight, and owners who put profit-seeking above all else. All those who were in a position of responsibility or authority over the Mall contributed in varying degrees to its demise.*

## General Conclusions

<b>Steel rusts.....</b>	<b>588</b>
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## Steel rusts

Iron + water + oxygen → rust



Basic science teaches that, given sufficient time, a combination of oxygen, water, and any iron mass will eventually convert to rust and disintegrate. If salt is present, the iron tends to rust more quickly. This process has been known and understood (at least in general terms) for millennia. Yet in Elliot Lake it seems to have escaped the attention of all those who should have cared. The few isolated voices of those who did protest were ignored or, worse, silenced.

In my months in Elliot Lake, I often heard it said that the collapse of the Algo Mall roof was the result of a “perfect storm.” The imagery and vocabulary of the disaster that befell the city of Elliot Lake and the families of Doloris Perizzolo and Lucie Aylwin are the antithesis of perfection. I would prefer to speak in terms of the inevitability of tragedy when neglect, apathy, and self-interest trump the values we expect of professionals, civic leaders, and corporate citizens. The evidence summarized in the preceding chapters provides ample targets: a poor initial concept, mediocre design, untested technology, faulty implementation, improper maintenance, timid and unheeded advice, apathetic oversight, outright greed, professional ineptitude, and carelessness.

The evidence is incontrovertible that the collapse of the section of the roof of the Algo Mall was caused by the severe rusting of the connection between one column and one beam. As a result, the connection failed suddenly and catastrophically. The more difficult question is why it was allowed to deteriorate to this extent.

As I express my views on this question, three important considerations come to mind:

1. Hindsight is merciless and unforgiving. What now appears clear and logical is not, in the tumult and fog of daily existence, easy to discern. With hindsight, a multitude of possibilities coalesce into definite certainties.
2. Elliot Lake’s relatively short existence as a city has not been a typical one. As the outline of its history in Chapter 2 shows, it experienced frenetic growth in its boom years, followed by a disastrous crash when the mines closed down. Municipal institutions striving to adapt to these often bewildering and rapidly developing realities faced huge challenges.
3. The story being told in this Report spans five decades. Of necessity, the Commission has had to rely on fragmentary evidence, particularly during the early years of the Mall’s existence. Human memory fades, documents get lost or destroyed, and potential witnesses pass away. James Keywan and John Kadlec, the Mall’s original architect and engineer, respectively, were both well advanced in age when they testified. Other significant witnesses from these years such as Nicholas Hirt, the vice-president of Algoma Central Properties, and Robert Gruhl, Elliot Lake’s chief building official, have died. Municipal and corporate records can no longer be found. In those circumstances, care must be taken not to build hard conclusions from fragments or wisps.

What follows is my best attempt at formulating a factual background for the recommendations that follow in the next chapter. I have attempted to avoid conjecture and guesswork. When hard facts are difficult to nail down with precision, a congruence of circumstances may well have led me to general conclusions after the cumulative weight of the detail makes coincidence appear highly unlikely. In the event that I have misunderstood some minor aspect of the circumstantial evidence, I apologize, but I take comfort in the knowledge that there will still be a solid base for each one of the recommendations.



## **The Algo Mall's design was ill-conceived**

### **The basic concept was faulty**

Climatic conditions in Elliot Lake are difficult and variable. They range between the extremes: high heat in summer and brutal cold in winter, accompanied by all forms of precipitation, depending on the season – rain, snow, ice, and slush. As a result, the 334-space rooftop parking lot at the Algo Mall was regularly exposed to sand and road salt, as well as heavy vehicles with scraping metal blades. Road salt coating the underside of vehicles would inevitably be carried onto the parking surface from elsewhere. The thermal extremes of weather affected the materials that made up the roof by causing significant cyclical expansion and contraction – the freeze–thaw cycle.

It may legitimately be said that the Algo Mall was doomed to early failure while it was still in the planning stages under its first owner, Algocen Realty Holdings Ltd. The decision to locate the majority of the Mall's parking spaces on its roof, above occupied commercial space, was a fatal one. Mr. Keywan testified that, as architect, he was uncomfortable with the concept. He considered five alternative possibilities: putting parking underneath the structure, locating it in a separate structure, acquiring additional land for surface parking, placing a light steel roof over the parking deck, or at the very least installing “stub” columns that could allow for the post-construction installation of a roof if it became apparent that one was necessary. All these options were rejected by the owner, primarily because of cost. It does not appear that the architect was vocal in his expressions of concern because he felt the experience of the owner's vice-president, Mr. Hirt, was considerable. Mr. Keywan had “complete faith” in Mr. Hirt and never expressed his own concerns in writing. The original engineer, Mr. Kadlec, thought the architectural design was unusual, but his reservations did not involve structural adequacy. He was more uneasy about the problems caused by traffic circulation and snow removal.

The very concept of rooftop parking was unusual, but it did not present insuperable problems beyond contemporary engineering know-how to ensure impermeability. It could be done, but it could not be done easily or cheaply.

### **The roles of the architect, the engineer, and the owner were confused and unorthodox**

Mr. Keywan testified that his mandate was limited: to provide architectural drawings only. Although this practice was not recommended at the time of construction, it was not prohibited. As things were arranged, Algocen acted as its own general contractor. The architect was not responsible for the waterproofing system. The engineer, whose contract was with the architect, was not responsible for either the building envelope or the waterproofing system. His work appeared to have met professional performance standards of the period.

No one was specifically designated as the prime consultant (a term that is not defined in legislation), though there were indications that, despite his denial, Mr. Keywan performed some of the functions normally encompassed by that expression. No independent professional reviewed the adequacy of the waterproofing system, yet both Mr. Keywan and Mr. Kadlec signed and sealed the certificate of substantial completion. Mr. Keywan had never once gone to the site, nor had anyone on his behalf. Mr. Kadlec appeared to have been content to sign the certificate, as something akin to a general review carried out by a separate firm of consulting engineers. Both men relied heavily on Mr. Hirt, a civil engineer, who had assumed the role of general contractor. Both must have known that considerable reliance would be placed on the certificate.

## **The building, excluding the waterproofing system, met the then-current requirements of the *Building Code***

The steel structure of the Mall building was constructed according to the architectural and engineering plans and specifications. While the beams as specified and installed were of slightly deficient capacity, this problem had no bearing on the collapse. The original welds connecting the beams to the columns met, and even exceeded, the *Building Code* requirements. Some assembly deficiencies were noted during construction (e.g., missing bolts, the structure out of plumb), but they were remedied and played no role in the collapse. Installation of the waterproofing system, and its need for bonding between the slab and the concrete topping, required that insulation be placed underneath the slab. That positioning may well have exacerbated the consequences of the freeze–thaw cycle. In addition, it would create confusion for professionals in their subsequent analyses of the parking deck.

## **The corrosion of the steel structure of the Mall was caused by a defective roof design**

Algocen made the decision to use a deck waterproofing system proposed by the Harry S. Peterson Company (HSP). The Mall's design called for a roof deck capacity of 120 pounds per square foot (psf). In the difficult climatic conditions of Northern Ontario, this deck had to accommodate both vehicular traffic and snow load positioned on top of the occupied commercial spaces below. HSP recommended the installation of a system that was an untried variant of one used successfully elsewhere. Despite the company's reputation in the industry, it had never before (except in some stand-alone parking structures) proposed a hollow core slab deck over a steel structure, with the deck covered by a bonded concrete topping with strip membrane over the slab joints. A "Double Tee" concrete support for a poured concrete deck would have been far preferable, but the cost of transportation of that type of large support member was high. Because Elliot Lake was at least 160 kilometres from a concrete batching plant, precast slabs were more economical than a poured-in-place concrete deck. This variant of the "Peterson system" was never used again.

The pre-stressed 30 or 31 feet by x 8 feet hollow core slabs themselves were robust, conventional, and time tested. In and of themselves they were reliable and *Code* compliant. With a properly bonded topping, they could meet load capacity requirements. Indeed, the Coreslab engineer who testified was of the opinion that they could meet those requirements even without topping – a view not held by many of the engineers who inspected the deck over the years. I need not, however, decide that issue.

There were other difficulties as well: the design of the three expansion joints was poor for a deck conceived to accommodate traffic in all weather conditions. Drainage and sloping were problematic. Even more important, HSP's experience with cracking in the concrete topping, anticipated and controlled in the double-T system, did not extend to hollow core slabs. Because of large size differences between Double Tees and hollow core slabs, the use of the Peterson system with slabs meant that there were many more joints, as well as more potential for movement and many more opportunities for sealant and grout failure.

An independent roofing consultant warned Algocen about the potential for failure and recommended installation of a full membrane between the slabs and the concrete topping, along with "over-engineering" (strengthening) the deck to allow for the addition of more wearing surface in the future if problems developed. These precautionary measures would have added significantly to the original construction costs and were never implemented.

Construction delays caused much of the concrete, grouting, and sealing work, as well as installation of the expansion joints, to occur very late in the fall or winter of 1979. This timing into the cold season may have compromised the performance of those materials.

The particularities of the system used at the Algo Mall are discussed in great detail earlier in the Report, and I don't need to repeat them here. Theoretically and conceptually, at least, the roofing system, by being designed both to shed and to drain water, met the *Building Code* requirements. However, one glaring and simple reality stands out: the system was a dismal failure from the moment it was installed. The parking deck leaked from the outset and throughout the entire life of the Mall. HSP's post-construction efforts to remedy the situation were futile. Water penetrated the concrete topping through cracks, intended and unintended. Some bonding between the topping and the slabs failed, allowing water to migrate laterally across the slab surfaces and along steel beams. Sealants failed, sealing methods were questionable, expansion joints allowed water penetration, and drainage was deficient. Heavy traffic and snow-removal equipment, along with the methods used to remove the snow, may have exacerbated the problems. For 33 years water laden with chlorides percolated down to the steel beams and their connections.

Bad choices made by the original owners, motivated by cost-cutting considerations, led largely to this chronic and dangerous situation.

## **After construction: The role of the engineering and architectural professions during the existence of the Algo Mall**

### **General**

The Mall never lacked from professional architectural and engineering oversight. During the 33 years of its existence it was visited, examined, evaluated, and reported on by engineers and architects on some 30 occasions. Appendix G summarizes these reviews and examinations. I suspect that few structures in Northern Ontario have been so frequently scrutinized. Yet the important and central recommendations relating to the parking deck's structural integrity and impermeability that flowed from that scrutiny were never implemented. Half-hearted and ineffective methods of leakage control were employed without success from the deck's beginning to its tragic end.

The engineering and architectural professions, to varying degrees, may bear some responsibility for the Mall's eventual demise. In fairness, many inspections and the reports that followed them were constrained by the narrowness of their mandate. Some were sophisticated and relatively thorough. Others, however, and those of the engineer Robert Wood in particular, were cursory and seriously deficient in terms of quality and content.

In my view, a number of important and relevant general observations are warranted:

- No serious and comprehensive survey, inspection, and analysis of the steel substructure of the Algo Mall's parking deck was ever commissioned and undertaken. Although occasionally recommendations were made that such inspections should be undertaken, they never happened
- In all the reports on the Mall's parking deck, there was never any attempt to foresee or predict the consequences if the recommendations made by the professionals were not adopted. There was never any explicit warning about the consequences to the steel substructure if corrective measures were not implemented. None of the professionals appeared to have anticipated the severity of the corrosion caused by years of leakage of water-entrained chlorides on the steel below. Little specific attention was directed to connections between beams and columns.



- Despite the obvious reality that the “patch-and-seal” method of waterproofing was ineffective, some professionals recommended its continuation.
- Some professionals were reluctant to review previous reports, out of a misplaced concern about importing the biases of previous inspections.
- One report in particular (Mr. Wood’s 2012 report to Eastwood) was amended to accommodate the owner’s desire to subdue objective criticism and to make the report more palatable. The changes were made without the supervising engineer’s knowledge and consent.
- Many inspections were strictly visual, and superficially so, with no attempt at qualitative testing or even minimal removal or displacement of obstructing material.
- The language of one report was phrased in such a way that an unsatisfactory remedial procedure was described as an “option” – suggesting that it might be viable when in fact it was not.
- Another report was not explicit in making clear that the recommended remedial procedure required professional supervision and implementation by experienced and qualified contractors. Even then, primarily for financial reasons, a variant of the ineffective patch-and-seal method of waterproofing was recommended, though the alternative but costlier option was clearly superior.
- Inspections were occasionally conducted without interviewing affected occupants of the Mall and determining the history of leakage. A “snapshot” approach was used often when optimal climatic conditions prevailed, without consideration of the deck’s behaviour over periods when conditions were less favourable.
- Engineers were confused about the carrying capacity of the deck, but they made only half-hearted efforts to discover it rather than careful consultation with other professionals or the literature or on-site examinations and analysis. This lack of solid evidence led to indecision and dithering on the part of owners and provided some of them with excuses for inaction.
- Some engineers were not careful in describing precisely the limits of their experience, expertise, and qualifications. In the case of one engineer, these factors may have led to a misapprehension about the need to bond the deck slabs to a concrete topping in order to achieve the desired level of load capacity. They may also have resulted in some engineers not being able to answer questions about the degree of degradation of the steel structure due to leakage and the remaining useful life of the building.
- Some opinions about the structural condition of the Mall were expressed without the involvement of a structural engineer.

## Mr. Wood’s reports require specific mention

Mr. Wood was first hired on April 8, 2009, to provide, on behalf of Service Canada, an as-built drawing and structural condition report of the tenant space previously occupied by Retirement Living (it was under the Hotel, not the parking deck). At that time he was told of leaks under the deck area but did not look at them. He was given the 1998 Halsall report.

I feel it necessary to set out, in summary fashion, the evidence that was heard about the manner in which Mr. Wood performed his duties. His reports, in my view, stand out in sharp contrast to those following other professional inspections. Those reports may have had flaws, in some respects and to greater or lesser degrees, but the quality of Mr. Wood’s product and his conduct were markedly inferior, to a point where they warrant repetition and emphasis. His work provided unfounded assurances and gave the Mall owner a documented excuse to continue doing nothing. His review was similar to that of a mechanic inspecting a car with a cracked engine block who pronounces the vehicle sound because of its good paint job.

### The October 28, 2009, report

On September 28, 2009, Mr. Wood was provided with the City's September 25, 2009, Order to Remedy and retained by Antoine-René Fabris, the owner's lawyer, to inspect the Mall – "specifically the items located under deficiency." Despite the breadth of the City's order to have the entire Mall area inspected, Mr. Wood interpreted his mandate to be restricted to only those areas specifically mentioned in it. He sought no clarification and failed to take any steps to resolve the potential ambiguity between the order and Mr. Fabris's letter. He was predisposed not to see any form of rust or corrosion. For essentially no articulable reasons that I could discern, he testified that he did not think that leaking had been ongoing for an extended period. He did not think it had been leaking for more than three or four years – yet in his report he uses the phrases "efforts over the years ... to waterproof the mall" and "many leaks have occurred over the years." He made no effort to review the files and reports in his own firm's files. Had he done so, he would have discovered the 2005 reference to leaks in the Library going back 16 years. His initial structural review was an examination of the original structural and architectural plans, with no verification of the "as-built" condition.

[Mr Wood] was predisposed not to see any form of rust or corrosion.

Mr. Wood conducted his inspection alone, armed with just a tape measure, flashlight, and notepad. He produced only summary notes – nothing detailed. He limited his inspection to areas pointed out to him by Mall staff and was prepared to rely exclusively on professionally prepared drawings that were 30 years old. His inspection was strictly visual. He asked no one how long the Mall had been leaking. He said that, because he was not made aware of previous orders by the City, he assumed the leaking was a recent problem. He was unconcerned by the rust he saw when he went up above the ceiling tiles. He paid little heed to concerns expressed to him by Mall employee Dimitri Yakimov about vibrations in the area of the deck that eventually collapsed. He made little or no inspection of connections because he thought the leakage was occurring in the mid-span of the beams and because most of them were covered by waterproofing. His report contained these phrases: "[W]e are of the opinion that the rusting has not created any structural loss of beam capacity," "minor surface rusting," "no loss of section of steel beams," and "no visual structural concerns ... with the structural steel."

In his inspection, Mr. Wood did not take any measurements of the flange of the beam that eventually collapsed. In his words, the corrosion observed "was not the type he would expect with loss of section." And he made no mention in his report of the areas he had not inspected because they were covered by fireproofing.

On November 16, 2011, Mr. Wood's licence was suspended by the Professional Engineers of Ontario. After his suspension, his firm required that all reports prepared by him be reviewed and signed by a properly qualified professional engineer. His clients, past or present, were not officially notified of this fact.

### The May 3, 2012, report

In the spring of 2012, despite the fact that he had been directed by members of his firm not to take on new clients, Mr. Wood accepted Eastwood's retainer to prepare a building condition survey – he described it as a follow-up inspection of areas he had inspected in 2009 – as a financing prerequisite by Business Development Canada. He carried out his inspection between 9:00 a.m. and 2:30 p.m. on April 12, 2012. His notes from that visit relating to structure refer to the addition of water-capture systems (troughs, bladders, and hoses), rusting of steel on exterior walkways, no visual distress, and no loss of section observed on steel noted to be rusted. He took no measurements to make this last observation, nor did he uncover any areas or inspect any connections. He did not recommend a more comprehensive inspection. His report did not imbue his recommendations with any sense of urgency.

Mr. Wood failed to advise his supervising engineer (Gregory Saunders) of the long-standing history of leaks at the Mall, of his previous 2009 report, or of the City's 2009 Order to Comply.

Much more egregious are Mr. Wood's changes to the report at the request of the Mall owner Bob Nazarian after Mr. Saunders had signed and sealed it. They were clearly intended to make the photographic evidence less graphic and the descriptors less alarming. Mr. Saunders was never informed of the changes.

## **After construction: The role of the owners**

The evidence is unequivocal that all three owners of the Mall had the means to fix the roof's problems – and in the proper way. None did. The motive behind their inaction was clearly financial. Rather than seriously come to grips with the leakage of the parking deck, they resorted to patchwork and cosmetic solutions. They sold or attempted to sell their problem.

### **Algocen, 1979–99**

As previously mentioned, Algocen's choice of design for the Mall was dictated in large measure by cost. Faced with the consequences of that poor design, it sought professional advice.

Algocen may have been advised as early as 1981 that a full membrane covering the entire parking deck surface was required to stop the leaks. The evidence is unclear whether a report prepared for the owners of the Woolco store was actually passed on to Algocen, but it would make little sense for the store to have commissioned the report and not provided it to the Mall owner. Subsequently, Algocen was advised on three further occasions that installation of a full membrane was recommended. One report suggested that remediation using the patch-and-seal method could be viable, so long as the work was specified by engineers and performed by qualified contractors working under the supervision of engineers. None of these recommendations was ever adopted. Algocen attempted remediation by having its own employees use past defective methods that had always proved ineffective. Recommendations to inspect the substructure, and the steel connections in particular, went unheeded. At the end of the HSP warranty period, Algocen took no steps to insist on an effective solution from that contractor. Rather than attempt to stop water penetration, its focus shifted to controlling ingress. Despite professional advice that the deck could at least support a "thin" membrane system, and without seeking any form of expert confirmation to clarify the situation, it persisted in a belief that the deck was at its maximum capacity. I heard no evidence suggesting there were public or municipal pressures to get the deck fixed properly.

Algocen was concerned as early as 1990 about the structure of the building, particularly whether the structure had been degraded by the salt-laden water on the concrete and steel. It told engineers it retained in 1990 that "we have definite concerns regarding structural damage." In 1992 senior executives acknowledged that, "at the end of the day," the company would have to test and re-evaluate the load capabilities of the structure because of age and the degradation caused by the water leaks. Regardless, Algocen took no steps to do so, even though it had been told in 1994 that corrosion would accelerate "exponentially" if the leakage was not treated. Ultimately, the "end of the day" for Algocen came not when it had to decide what to do with the structure but when it sold the Mall. It did so without carrying out any such test.

The recommended fixes were certainly not inexpensive, but, as the evidence has shown, Algocen was a large, successful commercial enterprise with ample resources. However, the focus of its commercial activities had changed, and it preferred vocations other than ownership and management of retail establishments in Northern Ontario. Its decision to sell the Mall formed part of that reorientation.



When the time came to sell the Mall to Elliot Lake Retirement Living, Algocen played its cards very close to its corporate vest. Information relating to the history of leakage and its potential negative effects on the Mall's structure was not divulged. However, I am not suggesting there was impropriety in this stance. The Mall was sold on an "as-is" basis.

## Elliot Lake Retirement Living, 1999–2005

There can be no doubt that the creation of the Non-Profit Retirement Residences of Elliot Lake (Retirement Living) and the pursuit of its objectives were intimately entwined with the objectives of the City of Elliot Lake. That alignment, as Mayor George Farkouh put it, was "to serve the best interests of Elliot Lake."<sup>1</sup> Few would disagree that Retirement Living was remarkably successful in achieving that goal – one it continues to pursue actively to this day. In that context, the justification for its acquisition of the Algo Mall was right and proper. The Mall was not only central to the economic and social survival of the City but coincident with Retirement Living's defining need to attract people to buy into its vision of reinventing the City as a retirement community.

Despite that commonality of interest, however, Retirement Living is an entirely separate entity, independent of the City's direction. It is a not-for-profit private corporation. The original letters patent of incorporation provide that all 12 members of the corporation are its 12 directors. The original members came from a cross-section of municipal interests: City appointees (2), Retirement Living program participants (3), community members at large (2), mining interests (2), Algoma East Community Service Board (1), the Chamber of Commerce (1), and the local hospital (1).

It is interesting to note that, over the years, by supplementary letters patent in 1993 and 2010, the composition has been changed at the corporation's behest. Among other changes, Retirement Living's Board of Directors itself now appoints five members who were previously elected by tenants or the residents of Elliot Lake. In other words, positions previously filled by broad-based suffrage have now become board prerogatives. The general public has no access to board meetings or Retirement Living corporate documents.

The City has always designated elected officials as its appointees – in my view, an odd choice for the City to make. It appears to me to put the directors / councillors in a position of potential conflict in those instances where the best interests of the corporation differ from the best interests of the municipality. Such a conflict certainly would have been the case when Retirement Living owned the Mall – for example, when there was a clear contravention of the City's by-laws by virtue of the perpetual leaking of the parking deck.

Although the City's appointees to the board were referred to by Richard Kennealy (general manager of Retirement Living), Mr. Farkouh, and many other people as the City's "representatives," their fiduciary obligations were to Retirement Living. In their role as board members, they were constrained from acting contrary to the best interests of Retirement Living. Nevertheless, the City appointees, in their role as councillors, also owed a duty to the City itself which, while not strictly the same as a fiduciary duty, is analogous.

It would have been open to these representatives or to the City to declare a conflict when the interests of the City and of Retirement Living clashed – such as when the issue of roof remediation, outlined in the Nicholls Yallowega Bélanger and the Halsall reports, came to the attention of board members immediately before Retirement Living purchased the Mall. Such a declaration would be standard protocol for a "representative" director.<sup>2</sup>

**The City has always designated elected officials as its appointees – in my view, an odd choice for the City to make. It appears to me to put the directors / councillors in a position of potential conflict in those instances where the best interests of the corporation differ from the best interests of the municipality.**

In addition to the conflict of duties and loyalties, the situation was exacerbated by the fact that, once they were appointed to the board, all the directors of Retirement Living were bound by very restrictive corporate confidentiality agreements.

All of Retirement Living's assets came from public funds in one form or another. In my opinion, its corporate structure and insistence on confidentiality operated to disenfranchise the citizens of Elliot Lake. While the narrow purpose for confidentiality has been described by counsel for the City as a desire to allay the fears of local businesses that their private information would be made public, the broader consequence, whether specifically intended or not, was to deprive the City of knowledge directly relevant to its duty to protect the public interest.

There certainly appear to have been sound and justifiable reasons for creating a separate entity to manage the City's inventory of housing. Without doubt, Retirement Living has been well administered, just as it has also been successful financially and in achieving its objectives. The reality, however, is that it has become a parallel quasi-civic administration, managing public assets and pursuing municipal goals without any opportunity for public scrutiny.

### Retirement Living and the roof

The evidence before me – without any contradiction – is that Retirement Living never intended to adopt one of the recommendations that would have led to a permanent solution to the roof's leakage problem. Documents

confirm that meaningful repair measures were put off to the distant future. Retirement Living clearly had the financial ability to undertake such measures. During its ownership of the Mall, it consistently met or surpassed the goals of its business plan. Its interpretation of the second Halsall report was undeniably flawed. How could it possibly overlook the specific reference to expert application and professional supervision of the repairs to the parking deck, yet conclude that a mere repetition of the previously ineffective remedial measures would work? The reality is illustrated by the notes of what Mr. Kennealy told the Library board in June 2005, after its members had complained again of the ongoing leaks: "[W]ill do: repair – some work – will not do large outlays of cash."

Various witnesses have testified that the decision to sell the Mall was unrelated to the leaks. Rather, I was told that Retirement Living wanted to free up financial and human resources to concentrate on other objectives more closely related to its core role and to return the Mall to a private-sector owner rather than be in competition with the private sector.

**The evidence before me – without any contradiction – is that Retirement Living never intended to adopt one of the recommendations that would have led to a permanent solution to the roof's leakage problem. Documents confirm that meaningful repair measures were put off to the distant future.**

Retirement Living knew that the Mall parking deck had been leaking for a long time. It did not pass that information on to the new owner, Eastwood Mall Inc. Indeed, it had no obligation to do so, as Eastwood was buying the Mall "as is" in exchange for price concessions. If Eastwood's principal Bob Nazarian chose, as his due diligence, to rely solely on the fact that the bank financing the purchase had carried out an inspection (without any knowledge on his part of the limited nature of that inspection), that was his business – and to his eventual chagrin. The situation was different in respect of the City, however. The City never received the Nicholls Yallowega Bélanger or the 1998 Halsall reports it had financed. It did not receive the 1999 Halsall report until 2007. Confidentiality agreements between Algocen and Retirement Living prevented release of information to the Retirement Living board about the particulars of these consultant reports. In any event,

confidentiality agreements between Retirement Living and its board members (including two City councillors) would have prevented transmission to the City. The City's chief building official at the time of the Mall's acquisition by Retirement Living testified that, if he had been made aware of the contents of the reports relating to permeability and structural integrity, he would have pursued the matter.

It is this culture of secrecy that may, at least in part, explain the City's inaction and that ultimately imperilled the lives, health, and welfare of the citizens of Elliot Lake.

### **Eastwood Mall Inc., Bob Nazarian, 2005 to collapse**

Eastwood was Bob Nazarian's alter ego. Whatever may be said about Eastwood's shortcomings as the owner of the Mall can also be said about Bob Nazarian, Eastwood's controlling mind. Eastwood was the third and last owner of the Mall – its last chance for structural salvation before meeting an otherwise inevitable fate. Bob Nazarian utterly failed in his role as the Algo Mall's overseer and, in the process, put in jeopardy the lives and safety of his employees, tenants, and customers.

During Eastwood's ownership, Bob Nazarian actively misled the City, its citizens, his tenants, employees, lending institutions, potential buyers, contractors, and engineers. His business dealings lacked scruple and integrity. I know these are strong words. There are no other, more charitable terms, unfortunately, to describe his behaviour.

To cite some examples: Bob Nazarian had others – his son, his lawyer, and his employees – do the writing for him so he could later deny authorship and say they had gone beyond his instructions and authorization. He failed to take active steps to rectify the Mall's problems, which, by 2005, had become acute and pressing. He heeded little, if any, of the professional advice he received. That failure led directly to the collapse.

Bob Nazarian realized, early on, that the Mall had become, to use his own words, a "black hole."<sup>3</sup> He may not have been provided with the entire dismal picture of the Mall's problems when he purchased it. Had he been a properly vigilant purchaser, however, he would have been better informed. He had the financial means to fix the problems, but he preferred instead to spend them elsewhere despite his awareness of the potential for structural damage. The great majority of his decisions were motivated by a concern for his own financial interests, at the expense of those of others. He often attempted to rid himself of the Mall by selling it, but was defeated by his unbridled desire to squeeze an extra dollar out of a transaction.

It is regrettable that Bob Nazarian was able to lull a timorous, timid, and credulous civic administration into a false sense of confidence about his intentions. He successfully exploited the City's inertia and gullibility.

**During Eastwood's ownership, Bob Nazarian actively misled the City, its citizens, his tenants, employees, lending institutions, potential buyers, contractors, and engineers. His business dealings lacked scruple and integrity.**



## After Construction: Role of the City of Elliot Lake

I am struck, as I examine an aerial photograph of the Mall and its environs, by the proximity of the Mall to the city hall – a few hundred feet at most. And yet, as I listened to the evidence of many of the members of Elliot Lake's civic administration and heard their purported lack of knowledge of the Mall's leakage problems, the Mall might as well have been located in Sudbury – or on the moon! The Mall was clearly the City's most important commercial structure – from a number of perspectives, ranging from fiscal to social. But to hear it told, official knowledge of some of its leakage woes ranged from non-existent to only a vague appreciation at best. Despite many of these civic witnesses' somewhat feeble attempts to plead ignorance, I am convinced that the leaking of the parking deck was widely known and understood.

Another aspect of the municipal bureaucracy that concerns me is the apparent collective ignorance or amnesia of its members about the particulars of its Property Standards By-law and of the powers vested in the City to enforce its provisions. That by-law required that every part of a building be maintained in a structurally sound condition and that the roof of a building be maintained in a watertight condition, so as to prevent leakage of water. That by-law and its enforcement policy were specifically discussed by council in 1995 and in 2005–6. Council dealt with it when the by-law was repealed and replaced with the same substantive requirements in 2003.

**The parking deck of the Algo Mall leaked continuously for 26 years before any action was taken by the City.**

The parking deck of the Algo Mall leaked continuously for 26 years before any action was taken by the City. Only in 2006 did it serve the owner a Notice of Violation – and then promptly forgot about it!

Three years later, when the Building Department recognized its failure to act, it issued an Order to Remedy, which it soon rescinded when it was provided with an engineer's inspection report that was clearly incomplete and defective on its face and after the most cursory of inspections by the City's chief building official.

The absence of corporate memory in Elliot Lake was clearly attributable, at least in part, to a poor archiving and retrieval system of data relating to building and maintenance issues. Information was lost when one official retired or passed away. The City lacked an effective platform for its data – one that was accessible, traceable, and updatable. It had no effective system-wide method to bring tasks forward and to monitor deadlines.

I was not particularly concerned by the City's official adoption of a complaint-driven enforcement process. That approach appears to be consistently favoured by many Ontario municipalities and is sensible in a resource-conscious municipal environment. What struck me, however, about Elliot Lake's interpretation of that policy was its overly bureaucratic and quibbling application. In the minds of some, the policy precluded any form of independent initiative by the responsible office holder, even in the face of blatant evidence of some form of problem. In the mind of others, it required slavish adherence to the form of the complaint. Still to others, a complaint had to be directed to a specific individual and no other. Preserving the anonymity of the complainant was not acceptable.

Elliot Lake's city hall is far from being a large, multi-level structure. All the offices of municipal officials are contiguous one to the other. Yet one is left with the impression that the building consisted of hermetic isolated offices whose occupants either did not share information or were prevented from doing so by virtue of their isolation. One particular chief building official appeared to be so jealous of his independence that he rejected the notion that conversation or suggestions were permissible and did not constitute an affront to his civic rights.

Throughout the Mall's existence, the appearance of work being done to remedy the leaks was good enough for the City. The fact that the same ineffective work was being performed over its entire lifetime, without appreciable results, was apparently lost on those charged with enforcement. The evidence has clearly shown that municipal officials were alive to the potential for structural damage due to water and chlorides ingress.

It seems that one fact has stood out and outweighed all others: the Mall was vital to the economic and social health of the community. It was central to Retirement Living's plan to attract retirees to move to and settle in Elliot Lake. It was a significant contributor to the City's tax base. It was an important rendezvous point for its population. It favoured the financial health of its businesses and provided needed employment to its residents. All these factors were fundamental to the corporate ideology that prevailed at city hall, and they permeated many of the actions, inactions, and decisions of its officials and may well have clouded their judgment when decisive corrective action was required. Partial or complete closure of the Mall was anathema – an attitude that percolated from the mayors down to all employees. It was an attitude that was both spoken and unspoken and was certainly well understood. It coloured the City's relationship with the Mall's successive owners and even led to the toleration of the last owner's egregious behaviour.

**It seems that one fact has stood out and outweighed all others: the Mall was vital to the economic and social health of the community.**

This predilection animated the City in its disregard of the persistent complaints of one of its most important institutions, the long-suffering Library. Even falling concrete in the food court was overlooked. It may well have explained what some have described as a wilful blindness about the by-law enforcement process. One can understand that tenants or members of the public or even the Library board may have been unclear about that process – but not those officials for whom enforcement was central to their role.

Warnings and direct complaints, particularly during the last decade of the Mall's existence, were varied and numerous. The narrative of the evidence is replete with reference to specific instances. They invariably and sadly fell on deaf ears.

It is beyond dispute that the City's practice of holding "caucus meetings" was illegal and operated to exclude the citizens of Elliot Lake from knowledge of discussions relating to matters of substantial public interest. Thankfully, that practice has ceased. During the 12 years when these meetings did occur, what specifically was discussed cannot be discovered, because no minutes were kept. As I have pointed out, it would be speculative to assert that Mall leakage was a topic of concern at those meetings. Nevertheless, I would be surprised to learn that leakage was never discussed. Open discussion of this problem at open meetings might have engendered public interest and fostered meaningful remedial action.

The most basic flaw in the dynamic that animated the City's relationship with the Mall is that the City was never an impartial arbiter between its role as a protector of the public interest, on the one hand, and, on the other, its role as the promoter of the Mall's value to the community. The City's enforcement responsibility was tainted by its protective instincts, just as its attitude went far beyond what might be justifiably defended as a conservative approach to enforcement. The City never drew the line beyond which inaction would cease to be tolerated. More fundamentally, it was in the worst possible conflict situation, particularly during Retirement Living's ownership period: It was, concurrently, the regulator and enforcer of the City's Property Standards By-law; the tenant (vicariously through the Library); and the owner, by virtue of its representation on the board of Retirement Living.

## The Ministry of Labour

The interest of the Ministry of Labour in the Mall's structural and leakage problems were in no way infused with ardour and consuming concern. During the Algocen years, the ministry had a field office in the Mall. Bearing in mind the general nature of its inspectors' responsibilities, it is, to say the least, surprising that the chronic leakage should have gone unobserved and undocumented. I have already described the attitude of one of the inspectors, Ed Hudson, as being incurious and his actions as perfunctory and inadequate. He seems not to have noticed clear evidence of flagrant leakage, and he failed to interview Mall employees and patrons about the incidence of past leakage. It may be that the nature and extent of his overall responsibilities were such that he was able to devote little "quality time" to the Mall's realities. It is also possible that, if the ministry had possessed a better corporate memory of the Mall's history of leakage, it could have given it more prominence on its list of priorities.

I heard no evidence of any form of formal or informal dialogue between municipal authorities and the Ministry of Labour involving matters of mutual concern at the Mall. Although the ministry's focus is narrower than the City's, a commonality of interest in such things as structural integrity and impermeability certainly existed.

I find it curious that, during the entire period of the Mall's existence, the leaking roof was the subject of relatively few complaints and reactive visits, particularly so when the leaking became much more prevalent. In the Mall's later years, the leaking roof and its effects were the subject of only two complaints and one visit. The first complaint was anonymous, and the ministry's response was tepid. The second complaint was met with what can only be described as an indefensible bureaucratic runaround by the ministry official who received the complaint.

There were, over the years, numerous occasions when the health and safety committees of individual businesses met to deal with leakage. Their concerns rarely made it to the attention of the Ministry of Labour.

It may very well be that the ministry's internal responsibility system acts as a disincentive to the reporting of problematic conditions. Employers may not be motivated to invite scrutiny for fear of the potential financial consequences, and employees may be apprehensive about the security of their employment.

## Summary

The deterioration of the infrastructure of the Mall parking deck did not happen overnight. It was the result of a poorly conceived and poorly engineered surface, decades of neglect, lack of competent and thorough inspection, inadequate official oversight, and owners who put profit-seeking above all else. All those who were in a position of responsibility or authority over the Mall contributed in varying degrees to its demise.



## Addendum

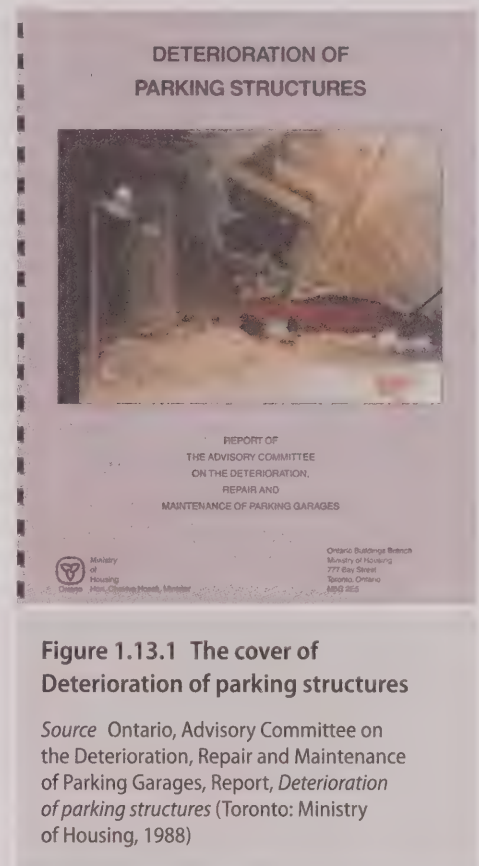
On May 8, 2014, more than nine months after hearing its closing submissions, the Commission received an anonymous letter along with a 1988 report, in both English and French, entitled *Deterioration of parking structures* (the report).<sup>4</sup> The report had not been produced to the Inquiry during its investigation. As a result, I issued Procedural Order No. 9:

### IT IS HEREBY ORDERED THAT:

1. The Ontario Government shall serve on the Commission and each Participants in Part I of the Inquiry, by 5:00 p.m. Friday, May 23, 2014, submissions, and related documents, in relation to the following questions:
  - a. Confirm the authenticity of the Report.
  - b. Describe what steps, if any, were taken by the Ontario Government upon receipt of the Report, including whether it established a comprehensive repair and restoration program (see p. ii of Report). If no steps were taken (or no program established), please explain why.
  - c. Did the Ontario Government conduct any additional study following the Report? If so, describe.
  - d. Did the Ontario Government adopt any of the recommendation set out in the Report? If so, describe the measures taken and how they were implemented?
  - e. Provide any documentation in relation to items b, c and d set out above.
2. A Participant to Part I of the Inquiry wishing to make submissions with respect to the Report and/or in response to the Government's submissions shall serve such submissions by 5:00 p.m. Friday, June 6, 2014 on the Commission and the Participants Part I.
3. Service of materials relating to this Procedural Order may be made by e-mailing a copy to the Commission of Inquiry and Commission Counsel at [info@elliottlakeinquiry.ca](mailto:info@elliottlakeinquiry.ca) and [counsel@elliottlakeinquiry.ca](mailto:counsel@elliottlakeinquiry.ca) and to counsel for the Participants Part I at [participants@elliottlakeinquiry.ca](mailto:participants@elliottlakeinquiry.ca).
4. All materials relating to this Application shall be posted on the Commission's website.

Ultimately, five participants provided submissions regarding my procedural order: the Government of Ontario, which delivered submissions on May 30, supplemental submissions on June 4, and reply submissions on June 18; exp Global (Trow), the Ontario Building Officials Association, Robert Wood, and the City of Elliot Lake (City).<sup>5</sup>

The Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages had been formed by the former Ministry of Housing in November 1986. Included among the committee's members were leading Ontario specialists who could address the deterioration of the existing provincial stock of approximately 3,000 parking structures – chloride-induced damage estimated to be worth about \$1 billion at that time (see also the report's Executive Summary). These representatives had been recruited from the Ministries of Housing, Government Services, and Transportation and Communications, along with municipal officials and consultants from the Trow Group, Halsall Robt & Associates Ltd., and Construction Control Ltd. The purpose of the Advisory Committee report was to provide by 1992 a comprehensive repair and restoration program that was "affordable, effective and enforceable."<sup>6</sup>



**Figure 1.13.1 The cover of Deterioration of parking structures**

Source: Ontario, Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Report, *Deterioration of parking structures* (Toronto: Ministry of Housing, 1988)

Chapter 1 of the report (“The Deterioration Problem and Inspection Techniques”) addressed the cause of the deterioration of the existing parking structures as follows:

It is now evident that the deterioration of concrete parking garages is occurring due to rapid corrosion (rusting) of reinforcing steel caused by the progressive accumulation of salt in the concrete. It is now generally accepted that the standards and practices applied until recently in the design, construction and maintenance of these structures are inadequate to ensure their satisfactory service and performance. As a direct consequence, the majority of existing parking structures are subject to rapid and progressive deterioration, which may result in localized and unexpected structural failure unless repairs are carried out.<sup>7</sup>

This chapter discussed the factors affecting the rate of corrosion on a particular building and the importance of inspection techniques in determining the extent of deterioration and its effect on the structure. The report pointed out that, for reasons of safety, periodic inspections were necessary to detect deficiencies and deterioration relating to load capacity and to provide timely information on the condition of the structures, so that prompt and cost-effective maintenance and repair could be carried out.<sup>8</sup>

Chapter 2 of the report (“Repair Methods”) identified safety as the primary consideration in repairs. It set out six repair methods, some of which had many variations, and provided decision criteria to assist in evaluating the different solutions. The report pointed out the importance of careful analysis in view of such economic considerations as cost, physical compatibility, and durability or performance.<sup>9</sup> It stated that correct diagnosis and repair methods suited to the context should be provided by a consulting engineer, that only qualified contractors should be selected and employed, and that continuing education programs should be provided to owners, consultants, and contractors.<sup>10</sup>

In chapter 3 (“Maintenance and Monitoring Procedures”), both these aspects of care were identified and elaborated on for post-tensioned and pre-tensioned precast structures. The chapter included a Planned Maintenance Schedule as an example of a systematic maintenance program for these structures. The Report suggested that the problems that could develop in such structures included leaks through concrete elements, causing corrosion to steel members resulting in rust stains; leaching of cement constituents, causing white film and stalactites on slab soffits; and damaged waterproofing and traffic toppings, resulting in leakage, staining, or leaching on the concrete surface.<sup>11</sup> With respect to the inspection and monitoring of steel structures, the report stated:

In addition to inspecting concrete elements for cracks, leakage, staining, leaching and spalling, checking for signs of distress in steel members must also be made. These investigations should probe for cracks, excessive deflection, distortion or buckling of steel members, or in portions of members such as beam flanges or webs, and any damage to corrosion protection, whether paint or galvanizing. Welded, bolted and riveted connections should similarly be inspected for signs of distress.<sup>12</sup>

The Government of Ontario provided two submissions in response to Procedural Order No. 9. In its first submission, Ontario confirmed the authenticity of the report and its delivery to the former Ministry of Housing. The report was one of many prepared in the late 1970s through the early 1990s regarding the durability and deterioration of multi-level parking structures. According to Ontario, the problem was well known in the sector. It noted steps taken to amend regulations for design and construction of new buildings, to disseminate and publicize the report widely to building owners, engineers, municipalities, and the public, and to participate in and support further research studies and projects relating to parking structures and their repair. However, it only *considered* whether to establish requirements for the inspection and maintenance of existing structures. Apparently, an impact study involving wide consultation had also been undertaken, and a policy paper had progressed into its draft stages. It was to focus on three scenarios: the status quo, a requirement for periodic inspection, and a requirement for regular certification.<sup>13</sup>

Ontario stated that the current Ministry of Municipal Affairs and Housing had not been asked to produce documents during the Inquiry but that it had now submitted them. Some of these reports describe the severity of the deterioration of parking structures as “reaching epidemic proportions” or as “now cause for serious alarm.” One in particular, a 1986 report, listed other studies, reports, and conferences that identified problems with parking structures as well as potential options for inspection and ongoing maintenance and repair.<sup>14</sup>

Ontario advised that it has been unable to find any copies of either the impact study or the policy paper, or of documents related to them. Furthermore, Ontario advised that it was challenging to find any records, given the passage of time since preparation of the report. Other than those documents it has already found, it would appear that any others have been destroyed in accordance with Ministry record retention schedules.<sup>15</sup>

Ontario reported that, following the Report of the Advisory Committee, it participated in studies conducted by Canada Mortgage and Housing Corporation and by the National Research Council Institute of Research in Construction. The final report of the Institute of Research in Construction project provided information to assist engineers and owners to formulate the repair strategy and maintenance practices of existing garages built without adequate corrosion protection. It was communicated to buildings owners, property managers, and others.<sup>16</sup>

As pointed out by Ontario in its submissions, the *Building Code Act* has not established any requirements for the maintenance or operation of existing buildings, including any standards for maintenance and repair.<sup>17</sup> No documentation is available through the searches conducted by the Ministry of Municipal Affairs and Housing to provide background to the policy decision made at the time not to establish standards for existing parking structures.<sup>18</sup> Ontario did not adopt a legislated comprehensive repair and rehabilitation program for existing parking structures.

Ontario made the point that any decision to consider whether to exercise the regulation-making power or to extend its scope can involve policy decisions that include discussion, on the one hand, of the difficulty in establishing standards capable of being enforced through regulation or, on the other, of the challenges with effective and efficient enforcement. Furthermore, the province argued, a wide range of challenges and opportunities were presented more recently by the participants at the Commission’s policy roundtables in November 2013. Nonetheless, there were, and are, legislative powers in Ontario to address the inspection and maintenance of existing buildings. In addition, municipalities have had the discretionary authority since 1972 through municipal property standard by-laws to establish standards for the maintenance and occupancy of existing buildings.<sup>19</sup> Ontario also pointed to the *Building Code Act*, which, since 1975, has provided a broad authority to chief building officials and building inspectors related to their duty to protect health and safety by challenging unsafe existing buildings.<sup>20</sup>

Supplemental submissions were made by Ontario following the discovery of additional documents related to the committee report. Of importance are three chapters that were omitted from the final report – the “Overview,” chapter 5: “Enforcement Procedures,” and chapter 6: “Development of a Communications Strategy.”

That part of the Overview dealing with existing structures discussed the difficulty of introducing legislation that would be “workable” for all affected parties, given the range of financing mechanisms used in the construction and maintenance of the troubled buildings. Periodic inspections of parking garage structures, the report stated, were required for reasons of safety in connection with the load carrying capacity of suspended parking floors. Inspection procedures and testing techniques used to assess the condition of the various garage components ranged from simple, straightforward procedures to sophisticated techniques that normally required the services of professional engineers.<sup>21</sup> No provincial legislation existed at the time that would require the mandatory



retrofit of existing structures to ensure structural safety. Building officials could take action when a building was structurally “unsafe,” but there was no objective standard at that time to determine if the building was “unsafe.”<sup>22</sup>

The Overview discussed a variety of issues, including

- a communication plan encompassing short-term and long-term strategies to reach all parties that have any involvement, direct or remote, with parking garages before legislation was enacted;
- a requirement for research before developing standard recommendation for repairs;
- extending a building’s useful life by a meaningful maintenance program;
- further research on technical matters, materials supply, training, economic studies, communications activity, and legislative impacts;
- development of a work plan for the period 1988–92;
- collection of documents on state-of-the-art repair methods;
- a survey, followed by development, of a cost-effective and functional maintenance program;
- analysis of legislation from other jurisdictions; and
- establishment of reserve funds.

The chapter ended with a summary of the other two chapters that were not published.

The Advisory Committee discussed what society (property owners in this case) could, through the tax system, afford to pay. It noted that many classes of property owners would be affected by any of the proposed new legislation, which, by its nature, could not be selective. The ability to pay for necessary repairs would vary among different owners, including such categories as social housing, public housing, non-profits, co-ops, condominiums, and municipal and commercial parkades. Research was required in areas such as the cost-effectiveness of repair methods, cathodic protection, membranes, and sealers.<sup>23</sup>

The unpublished chapter 5 dealt with enforcement procedures. The issue to be dealt with by the whole committee was whether the problem was serious enough to require a provincial mandatory minimum standard, or whether it was a local problem to be dealt with as a property standards matter by the municipalities under their maintenance and occupancy standards by-laws.<sup>24</sup>

The committee identified two methods of enforcement but did not recommend either one in particular:

- a scheme of mandatory retrofit under the *Building Code Act*, recognizing that amendments would have to be made to the Act and further regulations drafted under it;
- permits relating to structures – a plan that would probably require new legislation to authorize the issuing of such permits, which would have to be renewed on a periodic basis.<sup>25</sup>

The committee recommended that an impact study be undertaken, with a steering committee appointed to monitor the impact of enforcement on the various interests affected as well as to analyze solutions that had been legislated elsewhere in Canada and in the United States.

The unpublished chapter 6 discussed the need for a carefully coordinated communications strategy involving all stakeholders. It identified the following groups as having a direct financial involvement in the issue: developers, building owners, shopping centre owners, parking garage operators, and condominium owners. Others who were not involved through ownership but were likely to be brought into the problem through other direct or indirect means were consulting engineers, building officials, material suppliers, and contractors.<sup>26</sup>

In its reply submissions, Ontario reiterated the steps taken by the province – amendment of the *Ontario Building Code*, participation in amendments to the Canadian Standards Association guidelines for parking structures and repair of reinforced concrete in buildings, support for research, publication of the report and its technical chapters, and other measures. However, Ontario was not able to locate for the Commission either the impact study that was apparently carried out or the policy paper prepared on the Advisory Committee's recommendations.

Ontario suggested that it was reasonable to infer that a policy decision had been made not to develop laws, policies, and procedures for existing parking structures, probably for reasons involving affordability, effectiveness, and enforceability. The province seems to have preferred to empower municipalities to establish and regulate standards for the maintenance of buildings. The submission stated that enactment of additional legislative requirements or the establishment of new policies or procedures regarding the maintenance, repair, and inspection of existing parking structures in response to the 1988 report would not have prevented the tragic collapse of the Algo Mall. Given that laws were already in place requiring maintenance and repair of the Mall, and that inspections of the Mall were carried out by professional engineers throughout its life, including the beam that ultimately failed, Ontario argued that there was no basis for concluding that the changes proposed by the Advisory Committee for consideration by the government would have prevented the failure. Any such laws would have been effective only to the extent they were implemented.<sup>27</sup> According to Ontario, municipalities are best placed to understand and respond to local matters in this area, and it is not practical for the province to have staff in each community to inspect buildings or to respond to complaints regarding building maintenance. Even with provincial legislation, the province said, there was no evidence to suggest that the collapse could have been prevented.<sup>28</sup>

Ontario stated that, when the Mall was constructed, the problem of deterioration was well known, and the installation of membranes had long been an available solution. Studies, conferences, and research papers disseminated information to owners, engineers, and others, as the Advisory Committee's report had suggested. The province took additional steps through publications, workshops, project support and funding, and the development of standards to achieve that objective. Cost-effective repair methods had been published in the technical chapters of the committee report. In sum, the province argued that it is reasonable to infer that building owners, professional engineers who conducted structural evaluations, and municipal building officials were aware of the problems associated with parking structures, and it was incumbent on them to ensure compliance with municipal requirements.<sup>29</sup>

The City of Elliot Lake questioned why Ontario was unable to locate the Report and to produce it in a timely fashion, given the continuing obligation of all participants to provide relevant documents throughout the Commission process. Its position, essentially, is that enactment of provincial standards would have led to safer major infrastructure across the province, including the Algo Mall.<sup>30</sup>

The Ontario Building Officials Association was not able to determine whether it had ever received the report or was aware of it at the time. It submitted that new regulations under the *Building Code Act* and enforceable province-wide legislation should mandate retrofits for structural safety.<sup>31</sup>

Mr. Wood submitted that the information contained in the report should have been available to the Commission before the hearings. It would, he argued, have been of assistance in relation to the examination of witnesses. Moreover, the information in the report would have revealed that corrosion in pre-tensioned and post-tensioned concrete cannot be observed visually. He recommended that mandatory periodic inspections be legislated.<sup>32</sup>

Exp Global Inc. (Trow) made three points in its submission:

- the 1988 Advisory Committee report identified the state-of-the-art thinking at the time with respect to the inspection and repair of existing parking structures in Ontario;
- (a) Trow's work in the 1990s met that standard, as set out in the report; and
- (b) the Trow experts on the Advisory Committee in 1988 provided policy input to the Commission in 2013.<sup>33</sup>

## Conclusion

I am grateful to the person who provided this report anonymously to the Inquiry. It is extraordinary and mystifying that so many participants, unbeknownst to the Commission, had also been involved in the preparation of the Advisory Committee report. Despite that participation, not one of them made even the slightest mention of it, let alone produced the relevant documents. Obviously, the 1988 report represented a serious and determined effort to address the deterioration of parking structures caused by chloride damage which had "reached epidemic proportions" and was cause for "serious alarm." The relevance of the documents could not be clearer. They spoke directly about the problems experienced by the Algo Mall, although it is important to remember that the Mall was doubly cursed: it was not only a deteriorating parking structure but one, unfortunately, that was located over retail stores and other services beneath. The Advisory Committee report discussed issues that go to the very heart of the Mall's existence and tragic demise.

Ignorance of the existence of these documents resulted in missed opportunities for both the Commission and all its participants. Early knowledge of their content would certainly have affected the Commission's approach to its mandate. Clearly, the Commission's investigative resources could have been employed to discover their fate, contemporary actors could have been identified and interviewed, and other potential witnesses could have been identified. This information would have complemented the report prepared by NORR Limited after the Mall's collapse. It would certainly have assisted both the Commission counsel and the participants in their examination and cross-examination of witnesses and in the preparation of their submissions.

It is not sufficient to resort to conjecture and to infer that there must have been sound policy reasons for the failure to implement one of the options so seriously and carefully advanced by the Advisory Committee. Perhaps there were, but this Commission will never know and derive benefit from them. If those reasons did in fact exist, they should have been made known to me. If they were valid, they would have been of considerable value to me as I attempted to craft sound and effective recommendations. And so, the big question remains: Would those same policy reasons still be valid today, particularly in light of the events of June 2012?



## Notes

- <sup>1</sup> Farkouh testimony, May 2, 2013, pp. 7993–4.
- <sup>2</sup> See, for example, Jane Burke-Robertson, *20 Questions Directors of Not-for-profit Organizations Should Ask about Fiduciary Duty* (Toronto: Canadian Institute of Chartered Accountants, 2009), 8.
- <sup>3</sup> Bob Nazarian testimony, July 25, 2013, p. 18265; July 29, 2013, p. 18827.
- <sup>4</sup> Ontario, Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Report, *Deterioration of parking structures* (Toronto: Ministry of Housing, 1988), attached as Appendix B to the Commission's Procedural Order No. 9 (hereafter report). This report, along with all the submissions made by participants in relation to it, was posted on our website and considered by me in preparing both the following Addendum and my recommendations in chapter 14.
- <sup>5</sup> Province of Ontario, Submissions in response to Procedural Order No. 9; Submissions of exp Global Inc. (Trow) in response to Procedural Order No. 9; Submissions of the Ontario Building Officials Association, Procedural Order No. 9 and No. 11; Submissions of Robert Wood in response to Procedural Order No. 9; Response of the City of Elliot Lake to Procedural Order No. 9 and Procedural Order No. 11.
- <sup>6</sup> Province of Ontario, Reply Submissions – Procedural Order No. 9, June 18, 2014, p. 2.
- <sup>7</sup> Report, Appendix B to Procedural Order No. 9, chap. 1, p. 3.
- <sup>8</sup> Report, Appendix B to Procedural Order No. 9, chap. 1, p. 9.
- <sup>9</sup> Report, Appendix B to Procedural Order No. 9, chap. 2, p. 30.
- <sup>10</sup> Report, Appendix B to Procedural Order No. 9, chap. 2, p. 34.
- <sup>11</sup> Report, Appendix B to Procedural Order No. 9, chap. 3, pp. 45–6.
- <sup>12</sup> Report, Appendix B to Procedural Order No. 9, chap. 3, p. 47.
- <sup>13</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, pp. 6–7; app. G, *Building Action Newsletter* (Number 8, February 1989).
- <sup>14</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, p. 3; app. C, pp. 57–60.
- <sup>15</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, p. 7.
- <sup>16</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, p. 8.
- <sup>17</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, p. 10.
- <sup>18</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, p. 10.
- <sup>19</sup> *Building Code Act, 1992*, s. 15.1.
- <sup>20</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, May 30, 2014, pp. 10–11.
- <sup>21</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. C, p. 5.
- <sup>22</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, June 4, 2014, app. G, p. 2.
- <sup>23</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, June 4, 2014, app. C, pp. 20–1.
- <sup>24</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. G, p. 2.
- <sup>25</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, June 4, 2014, app. C, p. 9.
- <sup>26</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. H, pp. 2–4.
- <sup>27</sup> Province of Ontario, Reply submissions – Procedural Order No. 9, June 18, 2014, p. 5.
- <sup>28</sup> Province of Ontario, Reply submissions – Procedural Order No. 9, June 18, 2014, p. 7.
- <sup>29</sup> Province of Ontario, Reply submissions – Procedural Order No. 9, June 18, 2014, pp. 8–9.
- <sup>30</sup> Response of the City of Elliot Lake to Procedural Order No. 9 and Procedural Order No. 11.
- <sup>31</sup> Submissions of the Ontario Building Officials Association, Procedural Order No. 9 and No. 11, p. 3, para. 9.
- <sup>32</sup> Submissions of Robert Wood in response to Procedural Order No. 9, para. 22.
- <sup>33</sup> Submissions of exp Global Inc. (Trow) in response to Procedural Order No. 9, p.1, para. 2.



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## Introduction

My mandate directs me simply to make recommendations to the attorney general. As I have explained, the economy with which my mandate is described in Order in Council 1097/2012 creating the Commission requires that I adopt a purposive approach to its mission. To that end, I propose to advance recommendations on how best to improve current laws, regulations, policies, practices, processes, and procedures that exist to protect the citizens of this province and promote their well-being when they frequent or work in buildings that are generally similar to the Algo Mall in Elliot Lake – buildings used for mercantile occupancy. As I have also previously explained, I hope the government will seriously consider applying my recommendations to all publicly accessible buildings and workplaces in the province.

This Commission's role, as I acknowledged earlier, is not to castigate or chastise; its only purpose in finding fault, if it must, is to seek to prevent recurrence. Criticism of prevailing practices serves only to suggest their improvement or, if necessary, elimination. Any commission's report is, by its very nature, a forward-looking document. Its dissection and analysis of past events, its quest for expert opinion, and its examination of best practices have only one purpose: to put forward an opinion on how best to improve the current situation.

Ontarians can be justifiably proud of their existing system of rules and regulations meant to ensure public safety in the construction of buildings. Any observer of current events is familiar with the frequent news of tragedies around the world in locations where mediocre public controls, poverty, and greed have fostered conditions where dangerous public and private structures are allowed to exist. No system is perfect, however. We learn from past mistakes, and we must build incrementally on the shoulders and the experience of others with earnest purpose and determination.

In making the recommendations that follow, I favour a conservative and pragmatic approach:

- Solutions must be cost effective.
- Solutions must be practical.
- Implementation must be reasonably achievable.
- Implementation must be likely to attract consensus, support, and approbation from as broad a cross-section of society as possible.

As the proceedings of this Commission unfolded, I sought advice and suggestions through Commission counsel from all Participants and many witnesses, both in the witness box during the hearings or in final oral and written submissions. After the conclusion of the evidence, I held four roundtables where experts and responsible representatives of government, industry, and professional organizations offered their opinions and guidance. Each of these roundtables focused on particular themes, and Commission counsel invited written submissions and circulated a series of questions in advance to guide the discussion. The resulting advice has been invaluable. I am also deeply indebted to my legal and administrative support team, whose energy, experience, organizational strength, and dedication made that process flow smoothly.

In the preceding chapters of this Report, I explained the congruence of cumulative failings and failures that occurred during the existence of the Algo Mall and that led to its catastrophic demise and consequent loss of life on June 23, 2012. I now offer recommendations, supported by a careful examination of the evidence and the opinion of others, to minimize the possibility of recurrence and to make Ontario safer.



## Overview

I make a number of recommendations which can, in the main, be summarized as follows:

- There should be a mandatory province-wide requirement that buildings covered by my recommendations be maintained to a minimum standard to ensure public safety.
- All such buildings should be inspected by properly qualified structural engineers. These inspections should occur when a building is sold and, at a minimum, at a frequency that is commensurate with the risk of harm from a failure to meet the standard.
- Information about whether these buildings meet these minimum public safety standards should be available in an easily accessible and understood form to owners, the public, and prospective purchasers.
- The standards should be enforceable by a simple and practical process which requires that the responsible public authorities are accountable for the decisions they make and the actions they take.
- Those charged with determining whether buildings meet these standards as well as enforcing them, including professional engineers and municipal building officials, should be appropriately trained and certified, and owners and the public should have easy access to relevant information about their training, certification, and any discipline against them.
- Ministry of Labour employees conducting inspections in response to complaints of unsafe working conditions under the *Occupational Health and Safety Act*<sup>1</sup> should receive adequate training and direction to ensure proper inspections. In addition, there should be better communication among the Ministry of Labour, municipal building officials, and employers about issues relating to the minimum public safety standards.

In this chapter of the Report, I will explain the present statutory and regulatory framework that is intended to ensure public safety in buildings in this province; summarize why those safeguards were ineffective for the citizens of Elliot Lake who used the Mall; and then set out a series of specific recommendations intended to achieve the general goals set out above. For each specific recommendation, I will explain why it is needed and specifically how it can be achieved.

## Existing statutory and regulatory protections in Ontario

### Detailed mandatory and minimum standards and inspection at the time of construction; very limited mandatory standards or inspections after construction

Ontario's current system of mandatory minimum standards for design and construction is intended to ensure that buildings in this province are constructed to be safe at the time of their occupancy. All buildings must meet these mandatory minimum standards. They are enforced by professional oversight during the design and construction phase and by inspection at other important stages before occupancy.

However, after the occupancy certificate is issued, the situation is quite different. There are no mandatory minimum standards (except in workplaces), no required inspections, and no professional oversight. There are no mandatory minimum standards for building maintenance to ensure that buildings continue to be as structurally stable as they were when they were built. The provincial government has, by statute, the ability to enact such standards, but has chosen not to do so. Municipalities have the ability to enact such standards, but are not required to do so. If they choose to enact such standards, they are not required to enforce them, by inspections or otherwise. Nor are owners obliged to inspect their buildings. There is no requirement that professionals inspect any building (including workplaces) after initial occupancy unless repairs or changes are made that require a building permit. It may be trite to observe that, over time, systems deteriorate and materials weaken and fail because of a constellation of factors – such as ordinary wear and tear, maintenance practices, climate, and the inherent physical properties of matter.

### Before occupancy: building standards

#### Mandatory minimum standards for the construction of all buildings

The *Building Code Act* prohibits the construction of any building 10 square metres or larger unless a building permit has been issued.<sup>2</sup> A building permit may only be issued if the proposed building is in compliance with the *Building Code*<sup>3</sup> – a detailed set of minimum standards and specifications which are intended to minimize the risk of unsafe buildings. One objective of the *Building Code* is

to limit the probability that, as a result of the design or construction of a building, a person in or adjacent to the building will be exposed to an unacceptable risk of injury due to structural failure.<sup>4</sup>

The *Building Code* sets out elaborately detailed standards that must be met by all buildings in the province. It is 5 inches thick. Division B, Part 4, dealing with structural design, has 44 pages. It contains very particularized requirements dealing with issues, by way of example, as various and detailed as

- the minimum loads that particular types of buildings and structures (as diverse as “bleachers” and “billiard rooms”) must be capable of supporting;<sup>5</sup>
- the loads due to snow and rain expressed in a formula that takes into account the expected accumulation, the wind exposure, the slope of the structure, and its shape;<sup>6</sup>
- the dynamic effects of wind on the building structure;<sup>7</sup>
- the effect on the building structure of forces from potential earthquakes;<sup>8</sup> and
- the preservatives that must be applied to wood used in foundations.

## **Mandatory professional design and review before and during construction**

The *Building Code* provides that buildings of over 600 square metres in size or more than three storeys high must be designed by both an architect and a professional engineer.<sup>9</sup> Both of them are required to provide the appropriate design services within their area of expertise. They are also required to undertake a general review of the construction of the building in accordance with the Performance Standards of the Ontario Association of Architects and the Association of Professional Engineers of Ontario to determine whether the construction is in general accordance and conformity with the plans and specifications that were the basis of the building permit being issued.<sup>10</sup>

## **Mandatory enforcement by municipalities during construction**

The *Building Code Act* is enforced by municipalities.<sup>11</sup> Each municipality is required to appoint a “chief building official” and a sufficient number of inspectors to enforce the Act in the area.<sup>12</sup> All building permits are issued by the chief building official for the municipality in which the proposed building is located.<sup>13</sup> That official must receive a copy of the reports from all the architects and engineers arising out of their general review of the construction.<sup>14</sup>

The *Building Code* and the *Building Code Act* impose a positive obligation on a municipality’s chief building official to do a number of things. This official must, for example, either issue a building permit within a specified time or provide written reasons for refusing to do so.<sup>15</sup>

## **Mandatory inspection during construction**

The chief building official is required to conduct an inspection at each of up to 20 stages during the construction of a building.<sup>16</sup> Buildings may not be occupied until the chief building official or designate has carried out an inspection and issued a permit,<sup>17</sup> or until 10 days have elapsed after the chief building official has been given notice of completion of the building and the owner has complied with any order issued by an inspector under the *Building Code Act*.<sup>18</sup>

## **After occupancy: maintenance standards**

### **The province is entitled to enact mandatory general maintenance standards but has not done so**

The *Building Code Act, 1992*, provides that the province may make regulations to establish standards that existing buildings must meet, including regulations establishing standards for maintenance and repair.<sup>19</sup> In 2006, amendments were enacted by the Legislative Assembly to allow the province to make regulations establishing and governing a program to enforce such standards<sup>20</sup> and, in addition, to allow an inspector to conduct an inspection to determine whether any such standards have been complied with.<sup>21</sup> No such regulations have been enacted. As a result, there are no province-wide minimum standards for the maintenance and repair of buildings; nor is there any way for an official to ensure that buildings are safe except in municipalities that have enacted a property standards by-law or where a building is found to have deteriorated to such an extent as to have become unsafe or to pose an immediate danger.



## **The province has authorized limited discretionary enforcement by municipal inspectors where they find unsafe buildings, but they cannot order preventive maintenance**

The *Building Code Act* authorizes orders by inspectors appointed by a municipality to enforce the *Building Code Act* or the *Building Code* in two situations: where an inspector determines the building to be “unsafe”<sup>22</sup> and where the inspector determines that the building “poses an immediate danger to the health or safety of any person.”<sup>23</sup> Furthermore, there is no requirement that buildings ever be inspected in order to determine whether they are unsafe.

A building is “unsafe” for the purpose of such orders if it is

- structurally inadequate or faulty for the purpose for which it is used; or
- in a condition that could be hazardous to the health or safety of persons in the normal use of the building, persons outside the building, or persons whose access to the building has not been reasonably prevented.<sup>24</sup>

If an inspector determines a building is unsafe, he or she may require the owner to take the necessary steps to make it safe. If the order is not complied with, the chief building official may prohibit the occupancy of the building or the municipality may repair the building to remove the unsafe condition. The cost of municipal repairs may be added to the tax bill by the municipality.<sup>25</sup>

If an inspector is satisfied that a building is an immediate danger to the health or safety of any person, the chief building official may make an order requiring that the owner carry out repairs immediately to terminate the danger. If the owner does not comply, the chief building official may take any measures necessary to terminate the danger. The cost of doing so may be recovered by the municipality in the same manner as a tax bill.<sup>26</sup>

The *Building Code Act* does not appear to authorize a building official to require that a professional engineer prepare a report on the safety of a building. A property standards officer (sometimes a different person from the chief building official) may be accompanied by a “person who has special or expert knowledge concerning a matter related to a property or part thereof” when conducting an inspection to determine whether a property standards by-law has been complied with.<sup>27</sup> If no property standards by-law has been passed by the municipality, or the by-law that had been passed did not require that a building of concern be structurally sound or watertight, no expert inspection would appear to be available to assist a property standards officer in determining whether a building is unsafe. Furthermore, a building official or inspector conducting an inspection to determine whether a building is unsafe may not be a property standards officer, and thus unable to require an expert report even where a property standards by-law has been passed.

The existing legislation does not allow a building official to require the building owner to take any steps necessary to prevent deterioration of the building even if it is clear that, without those steps, the building will become unsafe.

## **The province has enacted mandatory minimum maintenance standards for workplaces, with potential Ministry of Labour inspections and professional input**

The *Occupational Health and Safety Act* requires that every building that is a place of work to which the Act applies be capable of supporting any loads that may be applied to it, as determined by the design requirements under the *Building Code* provisions in force at the time of construction, such other requirements as the government may prescribe, or “in accordance with good engineering practice” in other situations.<sup>28</sup> Workplaces

that fall under the Act's definition of "industrial establishment" (including offices, factories, and retail operations such as the Algo Mall) are governed by Regulation 851 – "Industrial Establishments."

Section 120 of Regulation 851 states that the *Building Code* applies to industrial establishments with respect to certain enumerated items, including structural adequacy.<sup>29</sup> Section 72 states that, where there is structural damage to the extent that a collapse of the structure or any part of the structure is likely to occur and cause injury to a worker, the building must be braced and shored (and done in a manner that will safeguard the worker performing this task) or, alternatively, that access to the area must be prevented.<sup>30</sup>

The Ministry of Labour carries out proactive inspections and reactive inspections. Proactive inspections are initiated by the ministry and are usually announced, whereas reactive inspections are made in response to complaints.<sup>31</sup> The ministry determines the priority of workplaces that will receive proactive inspections by identifying the risks and hazards at workplaces in particular sectors.<sup>32</sup>

There is no requirement for professional oversight or for mandatory inspections by Ministry of Labour inspectors to ensure that these provisions are complied with. An inspector under the *Occupational Health and Safety Act* may enter and inspect a workplace and may require that an owner or an employer provide, at the owner's or the employer's expense, a report from a professional engineer stating the load limits of a building and an assurance that the building is capable of supporting the loads likely to be applied to it.<sup>33</sup> If no such order is made, no inspection by an engineer is legally required.

The *Occupational Health and Safety Act* does require that a "health and safety representative" selected by the workers at a workplace conduct a physical inspection of the workplace at least once a month, to identify situations that may be a source of danger or hazard to workers and to report findings and any recommendations to the employer.<sup>34</sup> If a monthly inspection is impractical, the entire building must be inspected at least once a year, with part of the workplace inspected each month. There is no requirement that such findings or recommendations be reported to the Ministry of Labour, although an employer is required to respond to the employee's health and safety representative in writing and to give reasons if any recommendation is not accepted.<sup>35</sup> It is unlikely that all such representatives would have the expertise to determine whether the building in which they work is structurally sound. Nor would the employer necessarily have such expertise.

### **The province has enacted mandatory minimum standards or inspections for schools, retirement homes, bridges, condominiums, private hospitals, and residential tenancy units**

Some specific types of buildings in Ontario must meet minimum standards of continuing maintenance, and a few of these categories must be inspected periodically. There is no apparent rationale for determining which structures must be inspected, who must conduct the inspections, whether any particular standards must be met, what will be done with any report of inspection, or the remedies for any deficiencies determined to exist.

#### **Schools: "regular inspections" but no standards**

Schools for the blind and deaf must undergo "regular inspection," with any required repairs being reported to the Ministry of Infrastructure.<sup>36</sup> Principals of all other schools in the province must inspect the premises at least weekly and report any repairs that are required "in the opinion of the principal" and "any lack of attention on the part of the building maintenance staff of the school" to the local Board of Education.<sup>37</sup> No particular standards are required to be met by either type of school.

### **Retirement homes: “maintenance program” required with regular inspections but no standards**

Although no standards are particularized, every licensee of a retirement home in Ontario must ensure that a maintenance program is in place to keep the building in good repair.<sup>38</sup> Inspectors appointed by the province are required to conduct an inspection at least once every three years.<sup>39</sup> An inspector is entitled to inspect all relevant records and to call on experts for assistance; a professional consultant may be, but is not required to be, involved in the inspection. If a contravention of the regulation is found as a result of an inspection, the registrar of the Retirement Homes Regulatory Authority may make an order requiring that the licensee take such steps as are necessary to ensure that the regulation is complied with.<sup>40</sup>

### **Bridges: bi-annual inspection by engineer to determine “structural integrity, safety and condition”**

Bridges in Ontario are required to be kept “safe and in good repair.” They must be inspected at least once every other year, under the direction of a professional engineer, to determine their “structural integrity, safety and condition.” The inspection must be in accordance with the “Ontario Structure Inspection Manual,” a document published by the Ministry of Transportation.<sup>41</sup>

### **Condominium buildings: tri-annual visual site inspection but no standards**

Ontario requires that condominium corporations undertake “reserve fund” studies within one year of registration of the declaration (the legal instrument that creates a condominium corporation), and every three years thereafter, to ensure that sufficient funds are available to cover the cost of expected ongoing repairs and maintenance.<sup>42</sup> Studies include a “component inventory” that must set out the remaining life expectancy of each item listed there.

The study must be based on a “visual site inspection of the property” and of every item in the component inventory “where practicable.” Studies may be conducted by accredited appraisers, architects, certified engineering technologists, persons holding the designation of certified reserve planners from the Real Estate Institute of Canada, professional engineers, graduates of Ryerson University with a bachelor of technology (architectural science) – building option or architectural option, professional quantity surveyors, and architectural technologists or building technologists.<sup>43</sup> No particular standards are required to be met, and no particular type of inspection or report is prescribed.

### **Residential tenancy unit: must be weathertight and structurally sound but the only enforcement is a regulatory offence charge**

Ontario has enacted maintenance standards for rental units and residential complexes. They require:

- that “the structural elements in a residential complex shall be maintained in a sound condition so as to be capable of safely sustaining their own weight and any load or force that may normally be imposed”;
- that “every floor of a basement, cellar or crawl space, and every slab at ground level, foundation wall, wall and roof shall be structurally sound, weathertight and damp-proofed and shall be maintained so as to reasonably protect against deterioration”; and
- that “every roof shall be watertight.”<sup>44</sup>



These standards apply only where there is no municipal property standards by-law.<sup>45</sup> As I explain below, a municipality may enact a property standards by-law that does not contain such minimum standards. Furthermore, the only available enforcement of a provincial inspector's order to make the necessary repairs appears to be the ability to charge the owner with failure to comply.<sup>46</sup>

### **Other buildings: no provincial standards, inspection, or enforcement**

The Commission was unable to identify any requirement in provincial law for buildings with public access to comply with any standards regarding maintenance or structural soundness, or even with inspection for their safety. It is unclear on what basis the province has determined which types of buildings are required to be structurally sound and watertight.

## **Municipalities are entitled to enact maintenance standards**

The *Building Code Act* allows municipalities to enact by-laws prescribing standards for the maintenance and occupancy of property.<sup>47</sup>

### **A majority of municipalities have done so**

Of the 414 municipalities in Ontario, 265, or 64 percent, have complete property standards by-laws (covering all parts of all buildings in the municipality); 99, or 24 percent, have no such by-law; and 50, or 12 percent, have a by-law that covers only some of the buildings or some areas of the municipality. The municipalities with no property standards by-law are generally the smaller municipalities; the largest in this group are two municipalities with populations slightly larger than 18,000 persons.<sup>48</sup>

### **Most property standards by-laws require that buildings be structurally sound but not necessarily watertight**

The municipal property standards by-laws frequently include requirements that buildings be structurally sound. For example, Thunder Bay, Sudbury, Sault Ste. Marie, and Pembroke require that every building be watertight and structurally sound – “capable of sustaining its own weight and any loads to which it may normally be subjected.” Toronto and London require that buildings be structurally sound (with a similar definition to that used by the first group), but “weathertight” rather than “watertight.” Sarnia and North Bay require that all their buildings be structurally sound, but only residential properties must have roofs that are “weathertight.” Kitchener requires all its buildings to be structurally sound, but there is no requirement that they be watertight or weathertight.<sup>49</sup>

### **Municipalities have powers to enforce the by-law, but enforcement is optional**

Property standards officers are given powers by the *Building Code Act* to enforce property standards by-laws. They may

- inspect a property without a warrant to determine if it meets the standards of the by-law;<sup>50</sup>
- require production of any document or thing relevant to that issue;<sup>51</sup>
- be accompanied by a person with special expertise who may make examinations or take tests, samples, or photographs;<sup>52</sup>
- order that the owner take and supply tests and samples;<sup>53</sup> and
- order that repairs be done to bring the property up to the required standards or issue an order requiring demolition of the building.<sup>54</sup>

If the owner does not carry out repairs as ordered, and does not successfully appeal the order to the municipality's property standards committee or the Superior Court of Justice, the municipality may hire workers to repair the building or demolish the property.<sup>55</sup> The municipality has a lien on the land for the amount spent on the repair or demolition, and the lien has priority status over other interests in the land.<sup>56</sup> It allows the expenses to be collected in the same manner as taxes on the property.

Municipal enforcement of property standards is not required, even for those municipalities that choose to enact such by-laws.

### **Enforcement of property standards by municipalities varies greatly**

Many municipalities follow a "complaint-driven" enforcement policy. That means different things in different municipalities. Some municipalities require that a written complaint, containing the name and address of the complainant, be submitted to the property standards officer at city hall before an inspection can take place; they prohibit their officers from investigating potentially unsafe buildings in the absence of a complaint. Other municipalities allow anonymous complaints to be the basis of an inspection. Still others conduct inspections only if an appropriate complaint is received, but they allow property standards officers to conduct an inspection if they suspect that a property is in breach of the by-law.<sup>57</sup>

Some municipalities have a combination of complaint-driven and proactive enforcement policies. In this system, some types of properties are targeted for inspections in the absence of complaints.<sup>58</sup>

London has a by-law with provisions that are unique among the municipalities considered by the Commission's research. Its by-law relating to business licences requires that the building in which the business premises are located must meet the standards set out in the *Building Code Act* (interpreted to mean the provisions of the *Building Code* in effect when the building was constructed), the *Fire Protection and Prevention Act, 1997*, and the City's property standards by-law. When a new licence is issued and, in some circumstances, when an existing licence is transferred, an inspection is required by the City's property standards officers. A business licence will generally be refused until any deficiencies are corrected.<sup>59</sup>

## **Other provinces have enacted minimum maintenance standards**

### **Alberta permits public officials to inspect buildings to which the public has access and to make an order to fix or prevent dangerous conditions**

Alberta has enacted minimum maintenance standards for a number of types of buildings, such as housing and child-care facilities. The province has broad authority to detect and remedy a "nuisance," defined as "a condition that is or might become injurious or dangerous to the public health." A public official may inspect any building in the province "in which the public has an interest arising out of the need to safeguard the public health," such as accommodation facilities (including all rental accommodation), places of assembly, and "any other building, structure or place visited by or accessible to the public." The purpose of the inspection is to determine whether a nuisance is present or whether any of the regulations under the *Public Health Act* (including the housing premises regulations referred to in the following paragraph) have been complied with. The inspector is authorized to enter the building, require the production of any document relevant to the inspection, and perform tests as required.<sup>60</sup>

After an inspection, an order may be made requiring repairs as specified in the order, and all such orders must be posted in a conspicuous public place near the building and be made available for inspection at the regional health authority.<sup>61</sup>

Housing premises must be structurally sound, in a safe condition, in good repair, and maintained in a waterproof, windproof, and weatherproof condition. This regulation applies to structures used wholly or partly for accommodation purposes (other than owner-occupied buildings), including apartment buildings, dormitories, dwellings, hotels, lodging houses, and mobile homes.<sup>62</sup> These regulations also require that housing premises be maintained pursuant to the *Minimum Housing and Health Standards* approved by the minister of health. That document requires, among other things, that building materials which have been damaged or show evidence of rot or other deterioration be repaired or replaced, and that a professional structural engineer may be required to design and/or supervise the repairs or modifications required.<sup>63</sup>

Every daycare facility must be “in such a state of repair that it does not create a hazard to the safe and sanitary operation of the institution.”<sup>64</sup> A responsible official may require that the premises be inspected and evidence be provided to show that the operator is in compliance with this regulation before issuing or renewing a licence.<sup>65</sup>

## **Manitoba requires all buildings to have watertight roofs**

Manitoba has enacted a regulation requiring all buildings in the province to have roofs that are watertight and kept in good repair.<sup>66</sup>

## **Quebec has recently enacted province-wide minimum maintenance standards for all public buildings, multi-storey garages, and building façades**

Quebec enacted regulations in March 2013 which generally require that all buildings or facilities intended for public use be “maintained in a safe and proper working condition.”<sup>67</sup> In addition, multi-storey garages must be maintained “so as to ensure safety and prevent the development of a dangerous condition.”<sup>68</sup> Furthermore, façades (defined as the exterior walls of buildings, together with all accessories and objects connected to them) of buildings five storeys or higher “must be maintained so as to ensure safety and prevent the development of a dangerous condition.”<sup>69</sup> Owners of such buildings are required to follow a preventive maintenance program, hire professionals to carry out inspections every five years, perform the required repairs, and maintain and preserve a log for inspectors’ references.<sup>70</sup> The legislation authorizing these regulations was enacted following injuries suffered as a result of failures of buildings and parts of buildings in the province.<sup>71</sup>



## The existing regulatory scheme: professional engineers

### The regulatory authority: Association of Professional Engineers of Ontario

The Association of Professional Engineers of Ontario (PEO) regulates the licensing of both persons performing professional engineering and companies engaged in offering professional engineering services to the public in Ontario. The *Professional Engineers Act* provides that the principal object of the association is

to regulate the practice of professional engineering and to govern its members, holders of certificates of authorization, holders of temporary licences, holders of provisional licences and holders of limited licences in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected.<sup>72</sup>

The PEO has a number of other objects as set out in the legislation, including the establishment, maintenance, and development of standards of knowledge, skill, qualification, and practice for its members.<sup>73</sup>

### Standards and guidelines established for professional engineers

As discussed above, the *Building Code* requires that the construction, alteration, or enlargement of certain buildings, such as the Algo Mall, be reviewed by an engineer.<sup>74</sup> The Code further requires that this review be conducted in accordance with the Performance Standards of the Professional Engineers of Ontario.<sup>75</sup>

The PEO has several committees, including the Professional Standards Committee. This committee is responsible for developing Performance Standards, Practice Guidelines, and Practice Bulletins. All three serve different purposes and have different powers. Performance Standards currently\* have the force of law because they are established by Regulation 260/08 under the *Professional Engineers Act*. Practice Guidelines and Practice Bulletins, in contrast, do not have force of law but are intended to describe best practices. In addition, Practice Bulletins are used by the PEO to address urgent issues involving the practice of engineering.

### Performance Standards: Professional engineers are legally required to follow them, but none apply to review of existing buildings

Pursuant to s. 7(1) of the *Professional Engineers Act*, the PEO council may, on the approval of the lieutenant governor in council, make regulations respecting and governing standards of practice and performance for the profession.<sup>76</sup>

Section 78 of Regulation 941/90 (which was replaced by Regulation 260/08 on July 25, 2008) sets out Performance Standards for a general review of the “construction, enlargement or alteration of a building by a professional engineer as provided for in the building code.” These standards applied only in situations where the *Building Code* required a “general review” by an engineer when a building was being constructed, enlarged, or altered.

In cases to which these Performance Standards applied, they required:

- periodic visits to confirm that work was being done in general conformity with the plans and specifications;

• • • • •

\* Performance Standards that predate the passage of Regulation 421/86, which became section 78 of Regulation 941, do not have the force of law, and as such function as guidelines.

- recording of any deficiencies found, and written reports to the owner describing the deficiencies and the action required to rectify the deficiencies;
- reviewing of reports of others in relation to the work for which the engineer was providing the general review;
- interpretation of plans and specifications as requested; and
- reviewing of shop drawings and samples submitted by the contractor for consistency with the intent of the plans and specification.<sup>77</sup>

Currently, under Regulation 260/08, there are two Performance Standards:

- Construction of a building, which relates to a general review by a professional engineer of the construction of a building, as provided for in the *Ontario Building Code*; and
- Demolition, which relates to a general review by a professional engineer of the demolition of a building, as provided for in the *Building Code*, and to the preparation of demolition plans.<sup>78</sup>

The Performance Standard for “construction of a building” relates to “construction,” as defined in the *Building Code Act, 1992*.<sup>79</sup> The *Building Code Act, 1992*, currently defines “construct” as meaning “to do anything in the erection, installation, extension or material alteration or repair of a building and includes the installation of a building unit fabricated or moved from elsewhere and ‘construction’ has a corresponding meaning.”<sup>80</sup>

The Performance Standard set out in Regulation 260/08 in respect of “construction of a building” is essentially identical in its requirements to the Performance Standard set out in Regulation 941/90, summarized above.

No Performance Standard governs the examination or review by professional engineers of an existing building (which is not undergoing construction).

### **Practice Guidelines do not have the force of law, and none deal specifically with existing buildings**

The PEO issues Practice Guidelines for the purpose of educating both licensees and the public about best practices. The association also produces Practice Guidelines to meet the following objectives:

- to aid engineers in performing their engineering role in accordance with the legislation and regulations;
- to describe processes required by regulatory, administrative, or ethical considerations associated with specific professional services provided by engineers;
- to provide criteria for acceptable practice by describing the expected outcome of the process, identifying the engineer’s duty to the public in the particular area of practice, and describing the relationships and interactions among the various stakeholders (government, architects, other engineers, clients);
- to add value to the professional engineer licence for licensed engineers and for the public by outlining criteria for professional standards of competence; and
- to help the public understand what can be expected from engineers in relation to a particular task within the practice of professional engineering. By demonstrating that the task requires specialized knowledge, higher standards of care, and responsibility for life and property, guidelines help to reinforce the public perception of engineers as professionals.<sup>81</sup>

The current Practice Guidelines dealing with structural engineering services in buildings relate only to services being provided at the design and construction phases of a building project. They do not apply to structural examination, inspection, or review of an existing building, such as the Algo Mall.\*

Two other Practice Guidelines do affect all the work being done by professional engineers:

- Use of the Professional Engineer's Seal (in force in November 2008): the guideline provides direction for the use of seals in paper documents and in electronic documents.
- Professional Engineering Practice (most recent version came into effect in January 2012): the guideline covers a wide variety of topics generally applicable to the practice of professional engineering, including licensing, professional responsibility, the engineer's duty to report, and whistle-blowing.

### **Practice Bulletins: One issued following the collapse of the Algo Mall set out "best practices" for structural engineering assessments of existing buildings**

Practice Bulletins serve the same purpose as Practice Guidelines but are used for urgent or short-lived issues. Where appropriate, Practice Bulletins may be developed into new Practice Guidelines or incorporated into existing Practice Guidelines.<sup>82</sup>

In November 2012, following the collapse of the Algo Mall, the PEO issued a Practice Bulletin entitled "Structural Engineering Assessments of Existing Buildings."<sup>83</sup> This bulletin described a series of best practices, including a requirement to work with written agreements and to conduct the work set out therein; to review original design and construction documents, as well as any previous building assessments; to conduct on-site inspections; and to report on observed structural deterioration or defects and to analyze their potential impact on the structure.

The bulletin specifically stated:

#### **Agreements**

Engineers conducting structural engineering assessments of existing buildings should work with written agreements with their clients that specify, but are not limited to:

1. access to all documents and drawings they say they require to conduct the assessments, such as original design and construction documents and drawings. Alternatively, if these documents and drawings are not available, engineers may determine that they require additional field work, such as obtaining measurements of the structural elements, to obtain the needed information to conduct their assessments;
2. access to copies of prior building assessments, as well as maintenance and repair records of buildings being assessed;
3. access to buildings being assessed and all the critical areas engineers identify; and
4. additional investigations engineers determine to be required after reviewing preliminary data.

...

.....

\* Two current PEO guidelines relating to the design and construction of buildings are the Professional Engineers Providing Structural Engineering Services in Buildings, 1995 (revised November 1998); and the Professional Engineers Providing General Review of Construction as Required by the Ontario Building Code, April 2008 (revised November 2008).



### Inspection

...

Engineers conducting structural engineering assessments of existing buildings are expected to visit the buildings and carry out, with due diligence, visual inspections of:

- the condition of building structures – to identify types of structural defects, signs of structural distress and deformation, and signs of material deterioration;
- the loading on building structures – to identify deviations from their intended uses, and/or misuse and abuse, which can result in overloading;
- additions or alteration works affecting building structures – to identify additions or alteration works that can result in overloading or adverse effects on structures; and
- non-structural components that might affect structural systems.

If signs of structural deterioration or defects are present, engineers should provide opinions on the severity of the deteriorations or defects and recommend appropriate actions to be taken. Such actions might involve repair works or full structural investigation to parts or the whole of buildings.

Conducting visual inspections can be difficult, as main structural elements in buildings may have been covered up by finishes. It is, therefore, important that engineers exercise professional judgement to determine which covered areas should be exposed for inspection. Reference to structural layout plans to determine the presence of critical structural elements is crucial under such circumstances.

Inspections will, on occasion, yield information that indicates a structural problem might exist, requiring testing that was not included in the original scope of the inspection. Engineers should not hesitate to recommend to clients additional tests to uncover potential structural problems.

...

### Analysis

...

Engineers need to quantify observed structural deterioration or defects and analyze their potential impact on structures, as well as provide engineering opinions on the potential impacts of the deterioration or defects. For example, a structural steel element under corrosion should be measured for section loss and the engineer should provide an engineering opinion on the potential impact of the measured loss.

...

### Report

Engineers should present their findings in reports addressed to their clients. The level of appropriate report detail depends on the original reasons for assessments and will, by necessity, match the degree of complexity of the inspections and analyses. Reports should include but not be limited to:

- reasons for conducting structural engineering assessments;
- names of clients;
- addresses of buildings assessed;
- descriptions of buildings' main usages;
- clear descriptions of the actions performed, including when they were performed, and by whom;
- descriptions of areas not covered by visual inspections, why they were not covered, and engineering opinions about whether such areas are critical to the overall structural integrity of buildings; ...

- records of observations of signs of structural defects, damage, distress, deformation or deterioration; ...
- engineering opinions on the extent, possible causes and seriousness of identified problems;
- engineering opinions about whether identified problems are:
  - defects of no structural significance,
  - defects requiring remedial action and/or monitoring, or
  - suspected defects of structural significance requiring full structural investigation and immediate action;
- recommendations on remedial actions and/or monitoring to be undertaken by clients to ensure buildings' structural integrity, for example, restricting usage, relocating heavy machineries, removing additions, further investigation on structural adequacy, or phasing buildings out of service. Such recommendations should include timeframes within which repairs are recommended;

...

All opinions expressed in reports should be supported by relevant analyses or discussions. For example, if the opinion on a particular problem is that it is of no structural significance, the report should provide sufficient explanation to support that opinion.

The *Professional Engineers Act* requires engineers to affix their seals to final documents containing engineering content provided as part of services to the public. Reports of structural engineering assessments of existing buildings contain statements of professional opinion and therefore must be sealed. For further information on the use of the seal, refer to the guideline *Use of the Professional Engineer's Seal* at [www.peo.on.ca/Guidelines/UseOfTheProfEngSeal2010.pdf](http://www.peo.on.ca/Guidelines/UseOfTheProfEngSeal2010.pdf).<sup>84</sup>

### **Failure to comply with standards and guidelines is not by itself grounds for findings of misconduct by professional engineers**

A breach of the Performance Standards, because it is a "breach of the Act or regulations," constitutes professional misconduct under Regulation 941.<sup>85</sup> It could also be considered a "failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner."<sup>86</sup>

The effect of a failure to comply with a guideline or a bulletin (which do not have the force of law) is not as clear. According to the PEO, a "persistent or serious breach of a Guideline might be *evidence* of incompetence or negligence, but it may not be, in and of itself, grounds for a finding of professional misconduct" [emphasis in original].<sup>87</sup> Consequently, the Practice Bulletin entitled "Structural Engineering Assessments of Existing Buildings" issued by the association following the collapse of the Algo Mall has no legal force. In order to have that effect, the bulletin would have to be enacted by a regulation, by the council as a Performance Standard pursuant to s. 7(1)17 of the *Professional Engineers Act*.

### **No continuing education program required for professional engineers**

The *Professional Engineers Act* requires the association to establish, maintain, and develop standards of knowledge and skills among practitioners.<sup>88</sup> The Act is silent on how the association might maintain and develop these standards. Regulation 941 is clear, however, that engineers may be guilty of professional misconduct if they undertake work they are not "competent to perform by virtue of training and expertise."<sup>89</sup> There is no requirement for Ontario professional engineers to take part in a continuing education program to maintain their right to practise, although life-long learning appears to be strongly encouraged.<sup>90</sup>

Over the past 25 years, the PEO council has formed at least three task forces and committees to investigate the need for, and the ways of implementing, competency assurance or continuing professional development. It has also conducted two membership surveys that found strong support for the implementation of a continuing competency program. In response, the council created, but did not implement, a new licensure model that would have required practitioners to acquire a specified number of points relating to their professional development activities over a three-year period and a proposed Certificate of Practice regime for engineering firms. Consultation on the model led to a Professional Excellence Program requiring all members to sign a professional conduct declaration every three years, with those in active practice also signing a competence declaration and providing supporting documentation every three years. In addition, the program included a voluntary professional development evaluation module. It suggested that practice guidelines might be given greater emphasis in the future, along with the development of more guidelines.<sup>91</sup>

In 2002 the Professional Excellence Program was redefined as a voluntary professional profile form in which members could report both their professional development activities and their areas of practice and expertise. This program was put in place as a one-year pilot project, which was later stopped. In May 2007, however, the concept was revived when the council approved a voluntary annual reporting program (including scope and practice, professional development activities, and professional affiliations) through an online mechanism.<sup>92</sup>

Currently, the PEO is the only engineering regulator in Canada that has no form of either mandatory or voluntary continuing professional development.<sup>93</sup> The only obligation in Ontario is that contained in the association's Code of Ethics:

1. It is the duty of a practitioner to the public, to the practitioner's employer, to the practitioner's clients, to other members of the practitioner's profession, and to the practitioner to act at all times with ...
  - iv. knowledge of developments in the area of professional engineering relevant to any services that are undertaken, and
  - v. competence in the performance of any professional engineering services that are undertaken.<sup>94</sup>

## Transparency in disciplinary matters

### Publication of names of practitioners

Sub-section 38(1) of the *Professional Engineers Act* provides that those engaged in the administration of the Act must maintain as confidential all information received in the course of their duties. This requirement of confidentiality is subject to some exceptions, set out in the Act, in relation to complaints and investigations. However, once a matter goes to a discipline hearing that is open to the public, the evidence and documents filed at the hearing are generally considered to be public.<sup>95</sup>

Although discipline hearings are open to the public, the decisions and reasons of the Discipline Committee, with or without the name of the affected practitioner, may or may not be published in *Engineering Dimensions* (the official publication of the PEO) or elsewhere, depending on the nature of the outcome of the hearing and the directions given by the Discipline Committee.<sup>96</sup> Sub-section 28(5) of the Act requires publication of names if a licence is revoked or suspended. Where a practitioner is acquitted after a disciplinary hearing, that determination must be published, if requested by the practitioner, pursuant to s. 28(6) of the Act.



## Public access to licensing and discipline information

The Act also provides for one or more registers to be maintained by the PEO registrar. Section 21 provides that the register(s) must contain the following information:

- the name of every licensee and every holder of a certificate of authorization;
- the terms, conditions, and limitations attached to the licence or certificate of authorization;
- a note of every revocation, suspension, cancellation, or termination of a licence or certificate of authorization; and
- such other information as the Registration Committee or Discipline Committee directs.

Pursuant to s. 21(2) of the Act, any person has a right, during normal business hours, to inspect the register(s).

Until recently, information was not available on the PEO's website concerning current licence suspensions, revocations, cancellations, or terminations. Such information would be provided by staff to persons making telephone or written inquiries. The information is now publicly searchable on the website, by name. However, information concerning licence terms, conditions, or limitations is still not available on the PEO's website. A member of the public who seeks such information would have to contact staff at the PEO to obtain it.<sup>97</sup>

## Obligation by engineer to inform clients

There is no statutory obligation on an engineer to inform clients about a licence suspension, revocation, licence terms, conditions, or limitations.

## Specialist certification

Pursuant to s. 7(1)(22) of the *Professional Engineers Act*, PEO council may make regulations providing for the designation of licensees as specialists and prescribing the qualifications and requirements for designation as a specialist.<sup>98</sup>

No regulation has been passed pursuant to this power. Accordingly, there are currently no legislative constraints on the areas in which a licensee may practise and no specialty-specific certification procedures.<sup>99</sup>

## Recommendations

### Buildings to which these recommendations extend – large mercantile buildings

As discussed above, I interpret my mandate to require me to make recommendations with respect to the appropriate regulatory framework for buildings like the Algo Mall throughout the province. The Algo Mall had the characteristics of a building which the Ontario *Building Code* would describe as a “*building*” exceeding 600 square metres or three storeys in height used for “*major occupancy*” classified as “*mercantile occupancy*.” The *Building Code* defines each of those words in italics in the following way:

- (a) “*building*” means,
  - (i) a structure occupying an area greater than ten square metres consisting of a wall, roof and floor or any of them or a structural system serving the function thereof including all plumbing, works, fixtures and service systems appurtenant thereto ...;<sup>100</sup>
- (b) “*major occupancy*” means the principal *occupancy* for which a *building* or part of a *building* is used or intended to be used, and is deemed to include the subsidiary *occupancies* that are an integral part of the principal *occupancy*;<sup>101</sup>
- (c) “*mercantile occupancy*” means the *occupancy* or use of a *building* or part of a *building* for the displaying or selling of retail goods, wares or merchandise;<sup>102</sup>
- (d) “*occupancy*” means the use or intended use of a *building* or part of a *building* for the shelter or support of persons, animals or property.<sup>103</sup>

The *Building Code* provides that buildings exceeding 600 square metres or three storeys in height used for major occupancy classified as mercantile occupancy must comply with Division B of Part 4 of the Code, which sets out structural design requirements common to a wide variety of large structures in Ontario.

Since the Algo Mall would come within this definition, which is already recognized by the law of Ontario relating to standards designed to ensure safe construction of buildings, it is appropriate that I draft my recommendations to apply to all such buildings. Wherever one of my recommendations uses the word “*building*” or “*buildings*,” I mean a building which comes within this definition. I believe, however, that these recommendations ought to apply to all publicly accessible buildings in Ontario, including workplaces and multi-unit residential condominium and tenant-occupied buildings. The personal safety of all who enter such buildings is as affected by the manner in which they have been maintained as is the safety of those who enter large buildings used for mercantile occupancy. Persons using such buildings are as unable to learn of or prevent structural problems which may affect their personal safety as are those who enter shopping malls. They depend on the actions of owners and public authorities to inspect and maintain those buildings so that they are safe. I urge the appropriate public authorities to consider extending the application of my recommendations to all such buildings.

## Minimum structural maintenance standards for buildings



### Recommendation 1.1

**There should be province-wide minimum structural maintenance standards for all buildings in Ontario.**

**Rationale:** Public safety requires province-wide maintenance standards, just as it requires province-wide design and construction standards.

There is universal acceptance that all buildings in the province need to be designed and constructed so that they are safe and do not put persons in or near them at risk of injury or death from their collapse. Long ago, the decision was made that public safety could not be left to be protected in a hodgepodge fashion across the province, with different standards for the design and construction of buildings and different enforcement of those standards, depending on the views of each municipality. Furthermore, as the evidence at this Inquiry has shown, it is unwise to assume that, if a building is built properly, it will be maintained properly or will last forever. If safety requires that buildings be designed and built so that they are safe when construction ends, it also requires that buildings be maintained so that they are safe during the whole of their useful life.

The province has recognized the importance of minimum standards for some types of structures, such as “places of work,” bridges, and residential tenancy units in municipalities that do not have a property standards by-law. It has also recognized the importance of appropriate maintenance by requiring regular inspections of retirement homes, schools, and condominiums, without needing evidence that the building has failed to meet any particular standard. It is difficult to justify why citizens who drive across a bridge have a greater need to be protected from that bridge’s collapse than do citizens who go into a shopping mall. The rationale cannot be that many bridges were built more than a quarter century ago and are subject to significant deterioration. The same could be said of shopping malls, many of which were built in the 1970s and 1980s, as was the Algo Mall.

The *Building Code Act* provides, in s. 15.1, that a municipality *may* enact by-laws in respect of property conditions.<sup>104</sup> In 2013, 99 of 414 municipalities in the province, or 24 percent, had no property standards by-laws; 50, or 12 percent, had only partial property standards by-laws, and 265, or 64 percent, had complete by-law coverage. In my view, the safety of citizens entering buildings ought not to depend on local councils having had the wisdom and foresight to enact property standards by-laws which require that buildings be maintained safely.

The provisions of s. 15.9(2) and s. 15.10(1) of the *Building Code Act* which allow an inspector to order repairs or demolition where a building is “unsafe” or “poses an immediate danger to the health or safety of any person,” go partway toward establishing minimum standards. They do so, however, rather clumsily – by enacting a remedy when a building has become greatly deteriorated, rather than prescribing minimum standards to which a building must be maintained. Positive minimum standards are necessary as the basis for a program designed to ensure that building owners do what is required to *keep* their buildings safe, rather than just repair them to bring them back to a safe level after they have deteriorated.



Most participants at the roundtables agreed that all publicly accessible buildings should be subject to mandatory minimum standards for maintenance and repair.<sup>105</sup> As Stuart Huxley, the representative of the Association of Municipalities of Ontario, put it:

I think the question is ... that with respect to building permits and the building officials process, there is a question of bookends. At the front end, the building officials are involved through a permit process. If you are applying for a permit for construction or demolition, the *Building Code Act* is triggered. And then the building official's role that deals with emergency issues or unsafe buildings at the other end. It is that gap that we are talking about, the tools that would be available and the question that has been posed, what tool is possible?<sup>106</sup>

There was also general agreement that these minimum maintenance standards should be enacted by the province rather than by individual municipalities.<sup>107</sup>

Property standards by-laws typically cover a number of issues, from cosmetic to structural. Many of these are local in nature and should be left to be determined by municipalities.

The 1988 Report of the Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, discussed in Chapter 13, described the serious problem – repair costs estimated at more than \$1 billion – of the deterioration of parking garages caused by the effect of chloride-laden water on concrete, the steel-reinforcing bars embedded in concrete slabs, and steel frame supporting structures. The report emphasized, among other things, the necessity for a “detailed condition survey of parking structures, using specialized inspection and testing techniques” to determine the extent of deterioration, the effect of the deterioration on the present and future serviceability of the structure, the optimum strategy for maintenance and rehabilitation of parking garages, and the various technical and financial issues related to rehabilitation.<sup>108</sup> It concluded that periodic inspections were necessary to ensure the integrity of the load-carrying capacity of these structures, the need for their periodic repair, and, potentially, the major remedial action required to redress and halt the deterioration process before structural failure occurs. It set 1992 as the projected target date for arriving at a “comprehensive repair and restoration document which is affordable, effective and enforceable.”<sup>109</sup>

The three technical chapters were published and distributed,<sup>110</sup> as the province acknowledged in its submissions, “to building sector stakeholders including building owners, engineers, municipalities and the public through a ministry newsletter and through workshops with various members of the building sector”<sup>111</sup> “to assist owners and engineers in inspecting and maintaining existing parking structures.”<sup>112</sup>

Three chapters of the Advisory Committee's report were not made public. They consisted of an overview, consideration of possible enforcement procedures to ensure minimum maintenance standards for structural safety in parking garages, and recommendations with respect to “development of a communications strategy.” The uncirculated overview chapter noted that

[e]xisting legislation is not effective to ensure a province wide, uniformly applied retrofit standard for existing structures.

No provincial legislation exists which would require retrofit of existing structures on a mandatory basis across the province to ensure structural safety.<sup>113</sup> [Emphasis in original]

The uncirculated chapter dealing with enforcement methods did not make specific recommendations. It suggested two options to consider – mandatory retrofit; and issuing of permits for structures, which would have to be renewed on a periodic basis. Both of these approaches would have required new legislation and/or regulations. The report stated that the implications of such a change were “far-reaching.” It recommended that a

steering committee be formed, consisting of various interest groups, including the insurance industry, engineers and architects, developers and contractors, owners' groups, parking authorities, and the real estate industry in general, in order to conduct an "impact study."<sup>114</sup>

The last uncirculated chapter recommended a communication program to "effectively educate the public at large" about "the severity of the issue and the importance of remedial measures to that sector of the public which is likely to be affected directly, either financially or through disruption of daily life."<sup>115</sup> The province has advised that a number of steps were taken to make the report and its recommendations public. To quote from the Attorney General's submissions:

Progress reports on the status of the Advisory Committee's review and the receipt of the Report were sent by the former MOH [Ministry of Housing] to industry, municipalities, designers, building owners and other purchasers of MOH's Building Code publication through MOH's Building Action Newsletters.

The Report was published by the former MOH in both English and French. A large number of copies were printed and distributed to individual Building Code users as well as university and public libraries.

In addition, the Advisory Committee findings were publicized through workshops with building owners and others. A draft of the Advisory Committee's findings were presented at technical seminars conducted by the Nova Scotia Institute of Technology in 1987 and workshops on the maintenance of parking structures conducted by the Canadian Institute of Public Real Estate Companies ("CIPREC") for its members in Toronto and Montreal in March, 1989. Portions of the Advisory Committee's Report were presented as "guideline procedures for maintenance and monitoring of parking garages."<sup>116</sup>

It appears that, following the publication and distribution of the three technical chapters of the report, the recommended impact study was initiated to establish the best method of dealing with the problem. It was to include consultation with interest groups such as non-profit housing agencies, municipalities, building owners, rent review, condominium managers, property managers, the Minimum Residential Property Standards board, the Canada Mortgage and Housing Corporation, and the Building Owners Management Association.<sup>117</sup> The report resulting from this study has not been located.

What is clear, from the limited information available about the 1988 report and its effects, is that the provincial government and a number of stakeholders recognized the serious nature and potentially devastating results of the deterioration of parking structures by the very process that led to the Mall collapse. The government was advised to consider bringing in mandatory minimum standards for maintenance and repair of such structures. Consultation appears to have been limited to a group consisting of those having a financial interest in the issue. No one representing the public interest in being protected from injury and death caused by unsafe structures appears to have been included. Nothing was done other than to publicize the problem and make suggestions about how to prevent, detect, and repair it. No mandatory inspections or mandatory minimum standards were put in place. Public safety was left to cling to the hope that building science professionals would provide appropriate advice and building owners would behave responsibly.

Those hopes appear, with the clear vision of hindsight, to have been without foundation. The publicity given to the 1988 report appears to have faded over time, to such an extent that, when the very issue it was intended to deal with became the subject of this public inquiry, the report was not produced or referred to by the Government of Ontario or any of the building owners, building science professionals, the municipality, or the building officials' and property standards officials' organizations who appeared before me. To the extent that it dealt with ongoing maintenance issues, it may as well have never existed.

The evanescent life of this report and the belated revelation of its existence is, to me, clear and convincing evidence that education about the dangers of ignoring potential structural deficiencies, and exhortation to do the right thing, are not sufficient. That approach has been tried and has demonstrably been found wanting.

Public safety requires mandatory periodic inspection, following a prescribed procedure, by professionals qualified to recognize deficiencies and prescribe remedies. It requires that public officials be provided with the tools necessary to enforce those standards. And it requires that the public be informed of the inspections that have been carried out to detect possible threats to their safety, what those inspections have shown, and what orders have been made as a result.

### **Implementation: Enact a regulation under s. 34(2) of the *Building Code Act, 1992*.**

As I have indicated, s. 34(2) of the *Building Code Act, 1992*, allows the lieutenant governor in council to make regulations “to establish standards that existing buildings must meet ... including regulations ... establishing standards for maintenance, retrofit, operation, occupancy and repair.”<sup>118</sup> Although no such regulation has ever been enacted, it provides a clear mechanism to do so by an executive act, without the necessity for legislation.



### **Recommendation 1.2**

**The regulation outlined in Recommendation 1.1 should include a requirement that all buildings be watertight, structurally sound, and not unsafe, and be maintained in such a way as to keep them in that condition for a reasonable period (the “Minimum Structural Maintenance Standard”).**

In this recommendation:

- (a) “structurally sound” means capable of supporting its own load and any load to which the building may normally be subject; and
- (b) “unsafe” means:
  - (i) structurally inadequate or faulty for the purpose for which it is used; or
  - (ii) in a condition that could be hazardous to the health or safety of persons in the normal use of the building, persons outside the building, or persons whose access to the building has not been reasonably prevented.

This standard will hereafter be called the Minimum Structural Maintenance Standard.

### **Rationale: These are the minimum standards required to ensure public safety.**

Buildings that are unable to support themselves and any load to which they may become subject might collapse, putting at risk both building occupants and those nearby. Buildings that are not watertight may, over time, lose structural capacity as a result of rust on metal supporting members, freeze-thaw damage on concrete supporting members, and rot on wooden supporting members. It only makes sense that buildings in this province should be maintained in such a way as to ensure that these things do not happen.

A requirement already exists that many buildings in Ontario be both watertight and “structurally sound” as that term is defined in the preceding paragraph. The *Maintenance Standards* regulations enacted under the *Residential Tenancies Act, 2006*,<sup>119</sup> require, for residential tenancy units in municipalities without a property standards by-law, that “[t]he structural elements in a residential complex shall be maintained in a sound condition so as



to be capable of safely sustaining their own weight and any load or force that may normally be imposed.”<sup>120</sup> The same regulations require that “every floor of a basement, cellar or crawl space, and every slab at ground level, foundation wall, wall and roof shall be structurally sound, weathertight and damp-proofed and shall be maintained so as to reasonably protect against deterioration” and that “every roof shall be watertight.”<sup>121</sup> The *Occupational Health and Safety Act* requires that every building that is a place of work to which the Act applies be capable of supporting any loads that may be applied to it.<sup>122</sup> Most municipal property standards by-laws, where they have been enacted by Ontario municipalities, include a requirement, as did Elliot Lake’s, that a building be watertight and maintained in a structurally sound condition so as to be capable of supporting its own weight and any weight to which it may normally be subjected. Ann Borooah, chief building official for the City of Toronto and the executive director of the Toronto Building Department, agreed that minimum standards should include a requirement that buildings be structurally sound for the purpose for which they were intended.<sup>123</sup>

The definition of “unsafe” set out above already applies to all buildings in Ontario. It is copied from s. 15.9(2) of the *Building Code Act*.<sup>124</sup> Sub-section 15.9(4) gives an inspector authority to order a building owner to take the remedial steps necessary to render the building safe. I believe, as a result, that it would not be controversial to use this standard in a province-wide maintenance obligation.

I recommend going further by requiring building owners to ensure not only that their buildings are safe but also that they remain safe throughout their useful life. This requirement, coupled with the recommendations I set out below with respect to inspections, reports, and enforcement of these standards, will significantly increase the safety of those who use buildings in this province.

**Implementation:** Insert this requirement into the regulation proposed in Recommendation 1.1 to be enacted under s. 34(2) of the *Building Code Act*.

## Inspections of buildings to ensure compliance with the Minimum Structural Maintenance Standard



### Recommendation 1.3

**All owners of buildings should be required to ensure that their buildings are inspected periodically (a “prescribed structural inspection”) by a professional engineer to determine whether they comply with the Minimum Structural Maintenance Standard and what steps, if any, need to be taken to bring them into compliance.**

**Rationale:** A determination of whether a building is structurally sound should be carried out by a person with special training and experience, with professional qualifications, that ensure that he or she has the ability to make that determination.

If buildings are never inspected, it will be impossible to know whether they meet the Minimum Structural Maintenance Standard. As the evidence in the Inquiry showed, it is quite possible for a building to be owned

by the same owner for many years and deteriorate markedly over that period. Inspection at an appropriate frequency is necessary to learn whether a building is still as strong and watertight as the inspections conducted during construction showed it was at the beginning of its life.

The City of Elliot Lake has a Property Standards By-law, which had, in its relevant sections, been unchanged from the time that the Algo Mall was built. It required that

[e]very part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected.

And

The roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings.<sup>125</sup>

The City, however, did not require that the chief building official (who was also the property standards officer) to inspect any buildings in the City after the occupancy permit had been issued, unless a building permit had been applied for. The inspection in October 2006 was the first time the Mall had been inspected by the City to determine whether it met the requirements of the Property Standards By-laws. That inspection took place only because Tom Derreck came to Elliot Lake as the new chief administrative officer and demanded that something be done. This situation illustrates that, if an inspection is not required, one may very well not be done.

In my view, an inspection should primarily be the responsibility of the building owner, and not, at first instance, a public authority. As almost all those who attended the roundtables agreed, responsible owners will ensure that their buildings are regularly inspected. They have a sound business reason, as well as a moral reason, to ensure that their buildings are well maintained. Unfortunately, as the evidence I heard showed, not all owners are equally responsible. A legal obligation requiring such inspections to be done will ensure that all building owners, not just responsible owners, will do what is required for public safety.

If periodic inspections were required to be undertaken by municipalities or the province rather than the owner, the effect would be to pass on to taxpayers an expense that is already recognized by responsible owners as one of the costs of owning a building. The owners derive the benefit from owning a building; they should also be responsible for the expense. Furthermore, as Michael Ostfield, counsel to the Toronto Lands Corporation, said at the roundtables, the owner knows a building best.<sup>126</sup>

As the evidence led before this Inquiry has shown, an analysis of the structural capacity of a building as designed involves many technical issues. The *Building Code Act* requires that an engineer be involved in the design of a building and the review of its construction. That evidence has also shown that the question of whether a building has maintained that structural capacity over time involves technical issues. Only Robert Wood, of all the engineers consulted by owners over the 33 years the Algo Mall stood, was asked to determine its structural capacity in its present state. Unfortunately, he did not answer that question adequately or correctly. Nevertheless, it is clear that an engineer's skill and understanding are required to determine this issue. Had such an inspection been done properly at the Mall by an engineer, disaster might well have been averted.

A professional engineer has more than technical skills – he or she has professional obligations determined by the PEO, which, at the risk of professional discipline, must be followed. The PEO has the obligation and ability to determine what steps must be taken, and the professional skills required, to ensure that an inspection delivers sound information which can be relied on by owners and public officials charged with protecting the safety of the public.

There was widespread support at the roundtables for a requirement that buildings be inspected periodically by engineers retained by owners, that those inspections determine whether the building is structurally sound and safe at the time of the inspection and what measures are needed to ensure that it does not become structurally unsound or unsafe in the near future.<sup>127</sup> Ms. Borooah said that she supports periodic inspections by owners of the buildings “at greatest risk.”<sup>128</sup> Randal Froebelius, the secretary-general of the Building Owners and Managers Association (BOMA), expressed a similar view, suggesting an annual review of certain types of buildings, with the nature of the review dependent on the type of building, and referring to Quebec’s recent adoption of periodic reviews for parking garages.<sup>129</sup> Peter Sharpe, the former president and CEO of Cadillac Fairview and past global chairman of the International Council of Shopping Centres, agreed with the concept of periodic inspections by the owner, but was concerned about the practicality of enforcing such a requirement.<sup>130</sup>

### **Implementation: Enact a regulation under s. 7(1)(b.1) and 34(2.1)(b) of the *Building Code Act*.**

Paragraph 7(1)(b.1) of the *Building Code Act* allows the lieutenant governor in council to make regulations “establishing and governing a program to enforce standards prescribed under clause 34(2)(b)” of that Act, which would authorize the enactment of the minimum standards set out above. Furthermore, s. 34(2.1) of that Act allows the lieutenant governor in council to make regulations governing such a program, including regulations “governing the type and manner of inspections that are conducted under a program and the frequency of the inspections.” This wording would appear to give clear authority to the province to require inspections by an engineer and to specify what the engineer would have to inspect.



### **Recommendation 1.4**

**For buildings to which these Recommendations apply, the Professional Engineers of Ontario (PEO) should enunciate a Performance Standard for the prescribed structural inspection.**

The Practice Bulletin issued by the PEO discussed earlier, provides a good initial framework for the matters to be addressed and outlined in the Performance Standard. The Performance Standard should also address the procedure to be followed when the inspecting engineer believes that finishes should be removed and the client refuses to allow it. It should include the requirement that the engineer refuse to accept the retainer to inspect.

This recommendation coupled with Recommendation 1.15, which requires the owner to obtain and deliver a Structural Adequacy Report in certain identified circumstances, would serve to force the owner to allow a complete inspection in order to get an accurate picture of the actual structural condition of the building in the identified categories.

Many elements were glaringly missing from the building condition assessment reports and structural reports produced during the life of the Mall. The reports produced in accordance with the Performance Standard for the inspection of existing buildings should include, but not be limited to, the following:<sup>131</sup>

- (a) the reasons for conducting structural engineering assessments;
- (b) the names of clients;



- (c) the address(s) of building(s) assessed;
- (d) a description of the buildings' main usages;
- (e) a clear description of the actions performed, including when they were performed, and by whom;
- (f) a description of the areas not covered by visual inspections, why they were not covered, and engineering opinions about whether such areas are critical to the overall structural integrity of buildings;
- (g) the records of, and comments on, observations of loading conditions, indicating usages at different parts of buildings and identifying misuse, abuse, or deviations from intended uses; the records of, and comments on, findings of additions and alterations to building structures;
- (h) the records of observations of signs of structural defects, damage, distress, deformation, or deterioration;
- (i) the engineering opinions about whether existing usages and loading conditions are compatible with structures' intended uses;
- (j) the engineering opinions on the extent, possible causes, and seriousness of identified problems;
- (k) the engineering opinions about whether identified problems are:
  - (i) defects of no structural significance,
  - (ii) defects requiring remedial action and/or monitoring, or
  - (iii) suspected defects of structural significance requiring full structural investigation and immediate action;
- (l) recommendations on remedial actions and/or monitoring to be undertaken by clients to ensure buildings' structural integrity; for example, restricting usage, relocating heavy machinery, removing additions, further investigation on structural adequacy, or phasing buildings out of service. Such recommendations should include timeframes within which repairs are recommended;
- (m) relevant sketches, plans, and photographs with titles, explanations, and references to written portions of reports;
- (n) disclaimers that limit the liability of certificate of authorization holders to the specific intent and content of reports;
- (o) limitations and restrictions on engineers' work; and
- (p) additional recommended tests or investigations.<sup>132</sup>

The Performance Standard should also set out a guideline for evaluating whether the observed conditions are "poor," "fair," or "good." This type of evaluation guideline would be similar to the corrosion classifications identified in the Ontario Structure Inspection Manual as referred to by Dr. Hassan Saffarini during his evidence.<sup>133</sup>

In addition, the report should avoid generally sweeping statements such as "all beams inspected had little loss of section and we would consider the members still structurally sound." The report needs to identify the location of the structural components that have been inspected, and the engineer should be required to provide a statement that a proper representative sampling of the structural components has been inspected.

The Performance Standard should direct that engineers refrain from using the term “structurally sound,” unless the report specifically addresses whether the building was originally designed according to the relevant codes in existence at the time, or that an analysis has been undertaken to determine that there were no errors in the original design.

**Rationale: A Performance Standard relating to structural inspections of existing buildings would have the force of law and provide a consistent and clear procedure for the inspection. A breach of the Performance Standard would also constitute professional misconduct under Ontario Regulation 941 and be subject to disciplinary consequences.**

As the evidence led before this Inquiry has shown, and I describe above, there does not currently exist a standard procedure for the completion of condition assessments and structural reviews of existing buildings. All the firms retained by the three owners over the 33 years the Mall was in existence employed their own established inspection criteria. It also became apparent from the evidence before this Inquiry that there is no current standard to evaluate what constitutes a building in “poor,” “fair,” or “good” condition.

One common feature of all the inspections reviewed during the Inquiry was the visual nature of the inspections. I was told by the various engineers and consultants who appeared before me that building condition assessments and structural reviews involved no destructive testing and no removal of finishes. Indeed, some were even reluctant to lift ceiling tiles to examine the structural components.

The photographs taken by NORR Limited (the engineering firm retained by the Ontario Provincial Police to provide expert opinion about the cause of the collapse) demonstrated that, if the finishes had been removed during the inspections carried out at the Mall, inspectors would have been able to observe the conditions behind the walls and the ceilings – and their doing so could have potentially led to the early detection and repair of the problems that ultimately led to the collapse.

All the engineers and consultants who inspected the Mall during its lifetime placed a great deal of reliance on the fact that there were no signs of distress on the finishes (i.e. cracked or stained drywall), thereby failing to discover what lay behind these finishes. In addition, this practice can leave an inspector vulnerable to the actions of an unscrupulous building owner who may take steps before an inspection to hide evidence of problems through cosmetic repairs, masking the true condition of the building.

The PEO recognized the importance of providing guidance to its members when conducting structural inspections of existing buildings. As noted, it issued in November 2012 a Practice Bulletin entitled “Structural Engineering Assessments of Existing Buildings.” Although this bulletin provides best practices for the engineering profession, I consider that it is not sufficient. In order to provide greater certainty to the public, the standard for structural engineering inspections of existing buildings must have force of law. Enacting a Performance Standard for the inspection of existing buildings will assist in attempting to eliminate partial, uninformed, or uninformative inspections and will provide better guidance to engineers and owners on how these inspections should be conducted and what is to be included in the resulting reports.

In its submissions to the Commission and during its participation at the roundtables, the PEO expressed its willingness and desire to transform the Practice Bulletin relating to the structural assessment of existing buildings into a mandatory and legislated Performance Standard.

The following paragraphs refer to the “Structural Adequacy Report.” It is the nature and contents of this report that is to be mandated by the Performance Standard and must include the elements outlined above.

**Implementation:** The Performance Standard for the inspection should be enacted as a regulation under the authority of s. 7(1)(17) of the *Professional Engineers Act* and as a regulation under ss. 2.7(1)(b.1) and 34(2.1)(b) of the *Building Code*.



### Recommendation 1.5

**The prescribed structural inspection should be conducted in accordance with the Performance Standard by a structural engineering specialist who has met the Professional Engineers of Ontario (PEO) qualifications and requirements to be so certified.**

**Rationale:** The creation of a structural engineering specialist designation ensures there is a properly qualified structural engineer assessing the structural adequacy of the building.

In the past, members of the PEO had specialties identified on their seals. However, the practice was that the members determined the specialties listed rather than the PEO. I am led to understand that this practice was stopped and specialties no longer appear on the seal of the professional engineer. However, as evidence before this Inquiry has shown, some engineers do currently refer to their specialties and present themselves to members of the public as “structural engineers.” Robert Wood held himself out to the public as a structural engineer. This “self-designation” could lead the public to believe that the engineer in question has had to meet certain official criteria or pass specific exams. That is not currently the case. These self-appointed designations are based on an engineer’s main area of practice and are not granted by the PEO.

British Columbia has a different approach. Following the collapse of the Station Square roof in 1988 (Save-On-Foods in Burnaby), a commission of inquiry was established to determine the cause of the collapse and to make recommendations. One of the recommendations provided that, before structural engineers are registered, their competency should be tested by a special written examination or they should be subjected to additional supervised training, or both.<sup>134</sup>

Since then, the Association of Professional Engineers and Geoscientists of British Columbia (APEGBC) established a designation for a structural engineering specialist in that province. The title given to those members who have met the prescribed criteria is designated structural engineer (DSE). In British Columbia, the title “designated structural engineer” is granted to professional engineers who meet the requirements to create and manage the design of a building’s primary structural system. The primary structural system is defined as “the combination of elements which support a building’s self weight and the applicable live load based on occupancy, use and environmental loads such as wind, snow and seismic forces.”<sup>135</sup> The system which has been established in British Columbia requires that the seal and signature of a DSE appear on all plans and supporting documentation prepared by or under the direct supervision of the DSE and submitted for a building permit application for a Part 3 building (large residential, industrial, commercial, and institutional) as defined by the *BC Building Code*.



In its DSE program, the APEGBC has established that the engineer must meet the following requirements to obtain the title of DSE:

- (a) be a registered engineer in British Columbia;
- (b) demonstrate six years of significant post-graduate structural engineering experience, including two years in responsible charge of significant engineering work by submitting the following information:
  - (i) a chronological list of employers and positions held;
  - (ii) a structural project list specifying the project name, date, and position, as well as identifying the responsibility fulfilled on each project;
  - (iii) detailed information of three projects where the applying engineer acted as the structural engineer of record or has had a significant part of the overall structural engineer's responsibility for the project;
  - (iv) a list of continuing professional development activities.
  - (v) demonstration of a commitment to continuing professional development;
  - (vi) completion of the identified exams listed by the APEGBC; and
  - (vii) successful completion of the BC Codes and Practices examination.<sup>136</sup>

Although continuing professional development (CPD) is not mandatory for engineers in British Columbia, those carrying the designation of DSE are required to complete 150 hours of continuing professional development averaged over each three-year period. This designation may be revoked if the engineer does not meet those targets for three consecutive years.<sup>137</sup>

In order to establish a program for the certification of structural engineering specialists in Ontario, the PEO should determine the qualifications required to obtain the designation as well as establish an application process which would require a professional engineer to demonstrate a level of skills and qualifications showing that all the necessary criteria are met. The application process should also include a set of identified exams which must be completed and passed, similar to the process established by the APEGBC.

The PEO may wish to consult with the APEGBC to obtain assistance and guidance in establishing its own certification program and examination process. This Commission does not possess the means or expertise to expand on corollary issues such as the nature and desirability of transitional measures and grandfathering. Although I am inclined to the view that grandfathering in particular should not be considered, that discussion may be best left to the profession's governance and political realities.

In British Columbia, the role and responsibility to be fulfilled by the DSE applies only to construction and not to structural inspections of existing buildings.<sup>138</sup> The role and responsibilities to be fulfilled by a certified structural engineering specialist in Ontario should apply to construction projects and to structural inspections of existing buildings, as defined by the Performance Standards to be established in accordance with Recommendation 1.4.

**Implementation:** This Recommendation should be enacted as a regulation under the authority of s. 7(1)(17) of the *Professional Engineers Act* and a regulation under ss. 2.7(1)(b.1) and 34(2.1)(b) of the *Building Code*. Section 12 of the *Professional Engineers Act* should be amended to ensure that only certified structural engineering specialists, or those acting under their supervision, may carry out structural reviews of existing buildings.

## Reports of inspections to ensure compliance with the Minimum Structural Maintenance Standard



### Recommendation 1.6

**After conducting a structural inspection in accordance with the Professional Engineers of Ontario Performance Standard, the structural engineering specialist should complete a Structural Adequacy Report to determine whether the building meets the Minimum Structural Maintenance Standard and, if it does not, to describe what repairs and maintenance are required in order for the building to meet that standard.**

**Rationale:** At the roundtables, the consensus was that, given the Mall's history and the host of engineering consultants and others who inspected it from time to time for well over 20 years without appreciating or even mentioning the increasing threat to public safety, a fundamental change in approach and documentation was mandated.

During the life of the Mall, the leakage was ignored and never remedied. None of the engineers and consultants who inspected the building appeared to appreciate the effect the observed corrosion could have on its structural integrity and instead appeared to focus mainly on the condition of the concrete. If minimum structural maintenance standards had been in place, the engineers would have had a roadmap to follow which might have ensured that the effect of the corrosion was properly considered during the inspections.

Participants at the roundtables expressed concern over conditions which could potentially exist in a building that has been badly maintained, is underfinanced, and where important repairs have been deferred. In those circumstances, an owner retaining an engineer to perform an inspection as required in Recommendation 1.3 could attempt to find an engineer willing to conclude that the building is in good condition and provide the owner with the positive report sought.<sup>139</sup> The Structural Adequacy Report (SAR) should be required to determine whether the Minimum Structural Maintenance Standards have been met; if not, the SAR should identify the repairs and maintenance required to meet the standard.

Common to most reports entered into evidence during this Inquiry on the condition of the Mall was the failure to warn the owners that, if repairs were not carried out, further deterioration could lead to a public safety concern or alternatively to the failure of a structural component.

I believe that the presumption made by all the engineers and consultants who inspected the Mall was that no prudent and reasonable owner would allow its building to continue to deteriorate to the point of risking financial loss through the loss of tenants. Unfortunately, as was seen in the evidence presented, not all owners of commercial and publicly accessible buildings will act like the "prudent and reasonable owner." It cannot be assumed that all owners will take the necessary steps to ensure their building is in a proper state of repair.

The SAR must be drafted with the imprudent and unreasonable owner in mind and contain clear and specific warnings of what will occur if the building is not maintained to the Minimum Structural Maintenance Standard. The SAR also needs to provide clear and unambiguous recommendations on how to repair the building in order to bring it into compliance with the minimum standards.

In addition, if during the inspection the structural engineer uncovers something that is or could become unsafe, there should first be a duty to report it to the owner and provide clear and unambiguous directions on how to repair it. If the owner refuses to take timely action and the engineer has identified the condition as something that could endanger public safety, then the structural engineer should have a duty to report the unsafe condition to a higher level – such as the chief building official of the municipality in which the building is located.

Currently, professional engineers in Ontario have a duty to report unsafe conditions or a condition that could be a public safety concern. The failure to report constitutes professional misconduct which could result in disciplinary actions against the engineer.<sup>140</sup> This duty is also noted in the Professional Engineering Practice Guideline. As previously noted, this guideline does not have the force of law.

**Implementation:** This recommendation should be enacted as a regulation under the authority of s. 7(1)(17) of the *Professional Engineers Act* and as a regulation under ss. 2.7(1 )(b.1) and 34(2.1)(b) of the *Building Code*.



### Recommendation 1.7

**The Structural Adequacy Report should be provided to the owner of the building and simultaneously filed on a publicly accessible registry called the Structural Condition Registry.**

I recommend that the province create a publicly accessible registry on which Structural Adequacy Reports may be registered. Such reports could be viewed by members of the public searching online by building address. All members of the public would then be able to learn about the structural adequacy and watertightness of a building and what maintenance and repairs are required to ensure that the building either becomes or continues to be structurally sound.

A publicly accessible registry, the Environmental Site Registry, has already been created by the province to allow registration of environmental reports, called Records of Site Conditions. Such reports, prepared by qualified persons who must possess specified credentials, certify that the concentration of contaminants at the site meet certain standards. They can be viewed by anyone. The registry works in conjunction with statutory and regulatory provisions designed, among other purposes, to provide access to information about land to possible buyers, to regulators, and to the public.<sup>141</sup> The registry I recommend being created would share some of the purposes as the Environmental Site Registry and could be created in much the same way.

The registry should be created by the province rather than a municipality because it is more efficient to create one structure than the 414 that would be required if each municipality created its own. Those who use the registry, whether to register or access information, would have to learn only one system. The province has greater resources than do many municipalities. Furthermore, the province has experience with such registries, having created and operated the Environmental Site Registry.

**Rationale:** The Structural Adequacy Report describes whether the public is safe in the building to which they have access; there is no reason for this information to be secret.



As the evidence I have heard in this Inquiry makes clear, public safety can be a casualty of secrecy.

Owners have a vested interest in not advising potential purchasers about issues with their buildings, because a fully informed and advised purchaser may choose either not to buy or to offer a lower price. This situation led to the owners of the Algo Mall taking active steps to keep secret information about the physical condition of the building and to “sell the problem” to unwitting buyers.

Many of the safeguards in place to prevent such things, including purchasers exercising due diligence before making an irrevocable commitment to buying property, and lenders having inspections done before committing funds to purchasers, are regulated only by the financial interests of those involved. As happened here, that financial interest is sometimes thought to be better served by having a cheaper, and less intrusive, inspection than is required, or by buying property “as is” for a lower price. When this situation occurs, the public can be put at risk.

Public safety is too important to leave to the good intentions of those who own buildings to which the public has access or the public officials who have discretionary authority to ensure that such buildings are safe. As US Supreme Court Justice Louis D. Brandeis famously wrote, “Sunlight is said to be the best of disinfectants.”<sup>142</sup>

Public registration of all these documents would also allow engineers conducting inspections to have access to all relevant earlier reports. This access would, as the evidence has established, help ensure that such reports are supported by all the relevant information. An owner would not be able to sell a building without disclosing what it knew of the building’s structural condition. It would not be able to deal with a problem by selling it on to the next owner without that owner’s knowledge.

There was not agreement among those at the roundtables that the periodic inspection reports, even those which showed no problems, should be posted on a publicly accessible register. Many cited concerns about cost.<sup>143</sup> The representative of the Association of Municipalities of Ontario said that there should be access to the reports by a prospective purchaser, a professional conducting a subsequent inspection, and the chief building official of the municipality, suggesting that, because the chief building official acted in the interests of the public, public access was not necessary.<sup>144</sup> Brenda Lewis, speaking on behalf of the Ministry of Municipal Affairs and Housing, wondered whether the public would understand the reports even if they were publicly available.<sup>145</sup>

Mr. Froebelius said, however, that, if the reports only had to be posted for every building in the province to which the public has access, it was a good idea.<sup>146</sup> Alan Shaw, on behalf of the Ontario Building Officials Association, agreed and said that there was merit to consider making public reports on other sensitive uses and buildings, such as high-rise buildings and condominiums.<sup>147</sup> J. Lorne Braithwaite, the president and chief executive officer of BUILD Toronto and former chair of Ivanhoe Cambridge, owner of 40 shopping malls, agreed that high-rise buildings ought to be included in periodic reviews, with the reports being put on a register.<sup>148</sup> Mr. Sharpe supported making public a report that said that, if repairs were not carried out within a reasonably short timeframe, public safety would be at risk.<sup>149</sup> All acknowledged that any report filed with the government, whether municipal or provincial, would already be accessible under the relevant access to information legislation, subject to narrow exemptions.

I can conceive of no acceptable reason why this information should not be available to the public. There should be no contest between a private right to maximize an owner’s profit by keeping this information secret and the public interest in keeping people safe.

**Implementation:** By enacting a regulation under s. 7(1)(b.1) of the *Building Code Act* to create a Structural Condition Registry and requiring all Structural Adequacy Reports be filed on it.

Clause 7(1)(b.1) of the *Building Code Act* authorizes the lieutenant governor in council to make regulations “establishing and governing a program to enforce standards prescribed under clause 34(2)(b)” of that Act. I have recommended that the Minimum Structural Maintenance Standard be prescribed under that clause. Creation of a publicly accessible database, and requiring that Structural Adequacy Reports be filed on it, is part of the program I recommend to enforce that standard.



### Recommendation 1.8

**If the structural engineer concludes that the condition of the building does not meet the Minimum Structural Maintenance Standard, he or she should be required to provide a copy of the Structural Adequacy Report, which must set out the repairs or maintenance required to rectify the situation, to the municipality’s chief building official.**

**Rationale:** The chief building official needs to know which buildings are at risk in his or her municipality.

There is no point in the chief building official having the authority to order repairs or maintenance to make a building comply with the Minimum Structural Maintenance Standard if he or she is not informed of where the problems are.

There was general agreement at the roundtables, however, that it would be counterproductive to require every Structural Adequacy Report to be provided to a chief building official. As Mr. Froebelius said, a building department may not have the resources to go through every report from an annual inspection.<sup>150</sup> Dean Findlay, the immediate past president of the Ontario Building Officials Association and president of the Alliance of Canadian Building Officials, agreed that it would be beneficial for chief building officials to be provided not with all reports, but with reports that show any concerns or potentially unsafe conditions.<sup>151</sup>

The evidence I heard showed that there were a number of reports from engineers outlining structural concerns which were not provided, or not provided in a timely manner, to the chief building official of the City of Elliot Lake. If they had been, perhaps steps would have been taken more quickly to ensure public safety. I have no doubt that responsible chief building officials would deal with such information appropriately.

**Implementation:** This requirement should be included in a regulation enacted under s. 7(1)(b.1) of the *Building Code Act*.

## Enforcing the Minimum Structural Maintenance Standard



### Recommendation 1.9

**The chief building official of each municipality should have the authority to issue an order requiring repairs to a building that does not meet the Minimum Structural Maintenance Standard.**

Sub-section 15.9(4) of the *Building Code Act* now authorizes an inspector who finds that a building is unsafe to make an order requiring that the owner take the “remedial steps necessary to render the building safe.” The definition of “unsafe” has been described earlier: it is structurally inadequate or faulty for the purpose for which it is used, or in a condition that it could be hazardous to the health or safety of persons. Section 15.10 also authorizes a chief building official to make an order requiring remedial repairs to be carried out “immediately” where an inspector is satisfied that the building poses an “immediate danger to the health or safety of any person.” The Minimum Structural Maintenance Standard that I have recommended goes further – it requires that buildings be maintained in such a way that they will continue to be watertight, structurally sound, and not unsafe for a reasonable period.

#### **Rationale: Preventive maintenance is necessary for public safety.**

The evidence led before me showed that engineers provided a number of reports to owners of the Mall that recommended that the roof deck be repaired and maintained in a particular way. Those reports at a minimum implied that, if the work was not done, the structural stability of the building would be affected. Although Elliot Lake’s Property Standards By-law, together with s. 15.2(2) of the *Building Code Act*, did authorize the property standards officer to order that the building be maintained in such a way as to ensure that it was structurally sound and watertight, no such authority exists for buildings located in municipalities without a property standards by-law that includes such a requirement.

The Minimum Structural Maintenance Standard must be enforceable to have validity. I recommend that the enforcement be by the same public officer who now enforces the minimum safety standards set out in ss. 15.9 and 15.10 of the *Building Code Act* – the chief building official of the municipality in which the building in issue is situated.

Ms. Borooah agreed at the policy roundtables that the chief building official should have the power to order repairs where there was no present structural or safety problem but where one would develop if repairs were not done.<sup>152</sup>

**Implementation: A regulation should be enacted under s. 7.1(b.1) of the *Building Code Act* authorizing a municipality’s chief building official to make such an order as part of a program to enforce the Minimum Structural Maintenance Standard established by a regulation enacted under s. 34(2)(b) of that Act.**





### **Recommendation 1.10**

**After receiving a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard, the chief building official should be required, as soon as practicable but no later than 10 business days after receipt, to determine whether to**

- (a) issue an order requiring repair of the building so as to remedy the unsafe condition and the period within which the repairs must be conducted;**
- (b) order that the building be closed; or**
- (c) make no order.**

**Rationale:** The chief building official must be obliged to make a timely decision about what to do; if there is no such obligation, a decision can get delayed to the detriment of public safety.

The authority of the chief building official to order an owner to undertake repairs to a building must be discretionary. It would be wrong to put in place a system which requires that all repairs recommended by an engineer be made the subject of an Order to Comply by a chief building official. Not all situations may require such an order; in some cases, the owner will voluntarily and rapidly fix the problem. The engineer's report may be mistaken.

The chief building official, however, must not have the discretion to delay deciding what to do. Delaying a decision can, as occurred in Elliot Lake, quickly become equivalent to making no decision. With discretion comes responsibility. The position of chief building official is an important public office. The office holder is an important part of the system that keeps buildings in this province safe, both by ensuring that they are constructed in accordance with the *Building Code* and by ensuring that buildings are not allowed to deteriorate to an unsafe condition. He or she must be responsible for ensuring that decisions which are required are made in a timely manner.

**Implementation:** This requirement should be included in a regulation enacted under s. 7(1)(b.1) of the *Building Code Act*.



### **Recommendation 1.11**

**If the chief building official decides to issue an order requiring repair of a building, in the situation described in Recommendation 1.10, that order, together with written reasons therefor, should be served on the owner of the building and filed on the Structural Condition Registry. If the official decides not to issue an order requiring repair of the building, he or she must issue a written document explaining why no such order is required, and that document should be served on the owner and filed on the Structural Condition Registry.**

**Rationale:** Building owners and the public are entitled to know what decision was made and why it was made.

With responsibility comes accountability. Those who have a discretion as to how they exercise their important statutory responsibility should be required to explain to those affected why a decision was made, and whether that decision was to take action or not. Building owners are entitled to know why they are being forced to undertake what could be expensive repairs. Members of the public, whose safety may be affected by the decision, are entitled to know what is being done and why. This need to know is particularly necessary when the Structural Adequacy Report has been filed on the public register. Members of the public will know what the problem is; they are also entitled to know what is being done about it.

Public release of the decision will also encourage the chief building official to follow up and ensure that any repairs ordered are, in fact, carried out. In Elliot Lake, the public was not told about the 2006 Notice of Violation or the 2009 Order to Remedy, and neither was adequately pursued by City officials.

**Implementation:** This requirement should be included in a regulation enacted under section 7(1)(b.1) of the *Building Code Act*.



### **Recommendation 1.12**

**If the chief building official issues an order requiring repair of the building to bring it into compliance with the Minimum Structural Maintenance Standard, that order should provide a date by which the repair must be completed. If the repair is not completed within that period, the chief building official should have the authority, and should have to decide, whether to**

- (a) prohibit the use or occupancy of the building;**
- (b) cause the building to be renovated or repaired or demolished to bring it into compliance with the Minimum Structural Maintenance Standard or take such other action as he or she considers necessary for the protection of the public; or**
- (c) take no further action.**

**Municipalities should be required to create and maintain a system which ensures that necessary information about these orders is recorded, maintained, and brought forward at the appropriate time to the relevant officers to ensure that time-sensitive operations are properly performed.**

**Rationale:** Once made, an order to repair cannot be allowed to be ignored.

As the evidence I heard shows, orders are not always enforced. In Elliot Lake, the Notice of Violation issued in October 2006 and the Order to Remedy issued in September 2009 were both effectively ignored in their key provisions. No or inadequate follow-up allowed the leaks to go unfixed and the extent of structural degradation to remain unknown. I heard the explanation that the people in responsible positions had left the employ of the City without adequately briefing their successor in office and the matter “fell through the cracks.”

The *Building Code Act* already allows a municipality to carry out work required under an order issued to an owner who has failed to comply with the provisions of a property standards by-law, or an Order to Remedy an unsafe or emergency situation at the building. The provision I am recommending would extend that power to allow a municipality to undertake, at its own expense (recoverable from the owner), repairs required to bring a building into compliance with the Minimum Structural Maintenance Standard where the owner has failed to do so.

The appropriate thing to do in such circumstances may be to do nothing – in effect, to withdraw the order. But the chief building official should be seen to be explicit and deliberate in making that decision.

This issue was discussed at the roundtables. Mr. Ostfield said that, if an order was issued by a building official and not followed, he or she should have to either close the building down or have the necessary repairs carried out by the municipality; as he put it, the official should not be able to “just close the file and say ‘well, we are not going to do any of them.’”<sup>153</sup> Mr. Sharpe suggested that, in such a situation, at a minimum there should be a follow-up with a written explanation as to what resulted or why further steps were not taken.<sup>154</sup>

**Implementation:** This requirement and authority should be included in a regulation enacted under s. 7(1)(b.1) of the *Building Code Act*.





### Recommendation 1.13

**The decision of the chief building official under Recommendation 1.12 should be in writing, served on the owner, and filed on the Structural Condition Registry.**

**Rationale:** Building owners and the public are entitled to know what decision was made and why it was made.

This decision and written reasons therefor should have to be recorded and filed on the Structural Condition Registry for the same reasons as for the chief building official's original order – to ensure knowledge of, and accountability for, the decision that has been made.

**Implementation:** This requirement should be included in a regulation enacted under s. 7(1)(b.1) of the *Building Code Act*.



### Recommendation 1.14

**Where the municipality undertakes work under an order as outlined in Recommendation 1.12, the municipality should have a lien on the land for the amount spent on the renovation or repair.**

**Rationale:** This provision would ensure that the building owner and not the taxpayer is ultimately responsible for repairs to private property necessary for public safety and that the costs are borne, to the extent possible, by the owner.

This provision would be consistent with others in the *Building Code Act* which provide that, where a regulatory authority is required to make necessary repairs when the building owner has failed to do so, the owner cannot avoid being ultimately responsible for the cost. The owner has an obligation to keep the building maintained properly. If those who ignored that obligation were allowed to avoid the necessary cost, there would be a disincentive to comply with the law.

**Implementation:** This requirement should be included in a regulation enacted under s. 7(1)(b.1) of the *Building Code Act*.

## Frequency of inspection to determine compliance with the Minimum Structural Maintenance Standard



### Recommendation 1.15

**A prescribed structural inspection should be required, and the resulting Structural Adequacy Report registered on the Structural Condition Registry, at the following times:**

- (a) when a building is sold;**
- (b) when the chief building official of the municipality in which the building is located requires it by an order in writing;**
- (c) when repairs required by an order of the chief building official to bring it into compliance with the Minimum Structural Maintenance Standard are completed; and**
- (d) in any event no later than at a period of time after the last prescribed structural inspection (a time to be established after a report from the advisory panel (see Recommendation 1.16)).**

If a prescribed structural inspection is not carried out and registered on the Structural Condition Registry within an appropriate time, the chief building official of the municipality in which the building is located should be required to have the inspection carried out, and the cost of the inspection should be added to the property tax bill of the building owner.

**Rationale:** To ensure that information about the structural safety of a building is both up to date and provided at key times so that appropriate action is taken.

As the evidence I heard shows, building owners may choose to withhold information about the structural safety of a building from prospective purchasers. Requiring that a Structural Adequacy Report be provided when a building is sold would ensure that new owners know what problems, if any, exist in the building they have bought so that they may take the necessary steps to ensure public safety. Without such a requirement, new owners may have no reason to doubt the structural sufficiency of the building. When the last owner, Eastwood Mall Inc., bought the Algo Mall, it did so “as is.” It did not have an engineer inspect the building and it was not given the reports that Retirement Living possessed. Bob Nazarian chose to run a business risk by not obtaining his own inspection report – it was his to run. I suggest that putting in peril the safety of the public, exposed to a structurally unsound building, was not a danger he should have been at liberty to circumvent.

The present statutory language allows a property standards official to require “information” from an owner, and order that the owner “take and supply” such tests as are specified in the order, but only for the purpose of an inspection under a property standards by-law or the *Building Code Act*.<sup>155</sup> I recommend that a chief building official be authorized to order, at any time, an inspection by a structural engineer and provision of a Structural Adequacy Report. At the roundtables, Ms. Borooah suggested that building officials should have the power to request a review or report, should they choose to do so.<sup>156</sup>

The frequency of Structural Adequacy Reports is addressed by Recommendation 1.16 in this Report. As will be seen, I am of the opinion that buildings should be inspected and reported on only as often as is necessary to protect the public. That will probably vary depending on the nature of the risk, the type of building at issue, and, sometimes, between buildings of the same type.

A report should also be required when any repairs ordered by the chief building official have been completed. This requirement provides the chief building official and the public with the necessary assurance that the problem has been fixed. It also allows members of the public to determine, simply by reviewing the Structural Condition Registry, whether the regulator's order has been complied with. This ability to review the registry would help to prevent a situation similar to the one that occurred in Elliot Lake, where ordered repairs and inspections were not carried out.

There has to be some remedy to deal with situations where a required inspection does not take place. What is required is that an inspection occur, paid for by taxpayers, but with the cost recoverable from the property owner, who has the primary responsibility for obtaining the report.

**Implementation:** This requirement and authority should be included in a regulation enacted under ss. 7(1)(b.1) and 34(2.1)(b) of the *Building Code Act*.

Clause 34(2.1)(b) of the *Building Code Act* allows the lieutenant governor in council to make regulations "governing the type and manner of inspections that are conducted under a program [established by regulations enacted under s. 7(1)(b.1)] and the frequency of the inspections."



### **Recommendation 1.16**

**An advisory panel should be established as soon as possible to determine the appropriate classes of buildings, grouped by risk and the consequences of failure, and to make recommendations no later than 12 months from the release of this Report, on the following:**

- (a) which classes of buildings should be given priority for the initial periodic inspection;**
- (b) the time within which each class of buildings should have had an initial periodic inspection; and**
- (c) the appropriate period within which each class of building should be inspected on a periodic basis.**

**Rationale:** It will take time to inspect all buildings to which these recommendations apply; buildings that put most people at the most risk should be inspected first.



In the ideal world, all buildings should be inspected with sufficient frequency that any risk to public safety would be diminished. In the real world, there exists a large ill-defined inventory of existing buildings. It will take some time to inspect all of them. I have neither the skills, nor the evidence, to determine which types of buildings are most at risk. Clearly, high-risk buildings should be inspected before buildings that pose less potential for endangerment. Not all buildings will have to be inspected with the same frequency following the initial inspections. Some types of buildings, in some types of situations, will be more hazard-prone than others. I propose that a panel of experts, including structural engineers, be created to advise the Government of Ontario, at the earliest opportunity, on an appropriate approach to categorization, so that the necessary regulation can be enacted.

Let me be clear. I am proposing that technical experts be asked to consider these technical questions, develop solutions, and make recommendations. I am not proposing that this panel be composed of “stakeholders” in the normal sense taken from those who will be affected by the proposed inspection program, such as owners. The questions to be answered are technical:

- Which buildings are most at risk? and
- How often do different classes of buildings need to be inspected to ensure that they are safe?

I am not proposing that an advisory group be convened to determine whether such inspections are wise or necessary. In my view, that was the purpose of this Inquiry.

The Algo Mall stood, and leaked, for 33 years. In all that time, despite the basic facts being known to the owners, several professionals retained to inspect the building, and municipal officials and politicians, no inspection of the type I am recommending (the effect of rusting on structural integrity) was undertaken. Mr. Wood was given that task but did not attend to it. I can only conclude, by virtue of their inaction over that 33-year period, that, if those owners, officials, and politicians had been consulted about whether any such inspection ought to have been conducted (and how often), they may well have demurred.

There was broad support at the roundtables for determining the period when a building should be regularly inspected on the basis of expertise on the type of buildings most at risk. Although the representatives of the province did not make many suggestions as to what appropriate recommendations I might make, they did indicate that, if a recommendation was to be made to have periodic inspections, it would be helpful to have an expert determination of the scope of those inspections and their periodicity within a building’s life cycle.<sup>157</sup>

Recommendation

**Implementation: By seeking technical advice, and ultimately enacting regulations under ss. 7(1)(b.1) and 34(2.1) of the *Building Code Act*.**

The amendments to the *Building Code Act* that came into force in 2006 appear to have been designed to allow for just such a program. Paragraph 7(1)(b.1) allows the province to enact regulations “establishing and governing a program to enforce standards prescribed under clause 34(2)(b),” which I have recommended be used to create the maintenance standards I propose. Paragraphs 34(2.1)(a) and (b) allow the province to create regulations governing the “classes of buildings ... affected by a program” and “the frequency of the inspections.”

## Standards for building officials in Ontario municipalities



### Recommendation 1.17

**The existing standards for training and certification of building officials and inspectors under the *Building Code Act* should be amended to require mandatory continuing education.**

**Rationale:** Chief building officials make important decisions affecting public safety. Licensing simply on the basis of passing examinations appears to be insufficient to ensure that the requisite skills and knowledge are retained, maintained, updated, and applied.

The *Building Code Act* has, since 2002, required that building officials pass examinations in order to be eligible for their positions.<sup>158</sup> At present there is no requirement for work experience, skills-based training, or knowledge maintenance.

The Ontario Building Officials Association proposed at the roundtables that, in addition to the examinations, minimum standards for education, training, and experience be required. The association currently requires that applicants seeking to be certified meet such standards and maintain their certification by meeting minimum maintenance criteria. (Certification is voluntary – it is not required for chief building officials in Ontario.)

The evidence showed that two of Elliot Lake's chief building officials, Syl Allard (2002–2008) and Bruce Ewald (2008–present), had passed the requisite examinations to be appointed as building officials. Nevertheless, they failed to recognize or adequately deal with the potential problem of the incessant leaks at the Mall.

I recommend that the current standards be amended to require mandatory continuing education, at a minimum, for persons occupying those positions. The cost of delivering continuing education programs to remote areas of the province has been significantly reduced with the availability of web-based training. These officials play a crucial role in protecting public safety. They should be given every opportunity to learn and retain the necessary skills and knowledge to be effective in that role.

**Implementation:** Amend the qualification requirements for chief building officials in the *Building Code* to include mandatory continuing education.



### Recommendation 1.18

**The *Building Code Act* should be amended to provide that building officials and inspectors are public office holders who are independent of the municipal council, but that it is entirely appropriate for the council or the chief administrative officer of the municipality to direct a concern to the attention of the building official to be dealt with as he or she sees fit.**

**Rationale:** The implementation of this recommendation would ensure that chief building officials are not influenced to treat certain building owners more leniently as a result of perceived or actual pressure from council.

I have concluded that Syl Allard and Bruce Ewald, Elliot Lake's chief building officials between 2002 and the time of the collapse, failed to adequately enforce the Property Standards By-law because of a perception that the mayor and council wanted to avoid taking any action that had the potential to close down the Mall. This situation is entirely inappropriate. Chief building officials should be free to exercise the responsibility with which they are charged in the way that they believe is appropriate, subject only to the obligation to actually make the decisions they are required to make, explain why they have decided in that way, and follow through on what they have decided.

At the same time, however, it is completely appropriate for a municipal council or the chief administrative officer to ask a chief building official to consider a situation and determine what steps, if any, should be taken as a result.

Mr. Ewald was not entirely clear about his view of the propriety of such an action. He testified that he considered it "very unusual" that council had involved itself to the extent it did in 2006 at the time of the Notice of Violation and that he thought it was inappropriate for council to direct a property standards officer to issue an order requiring that a building be brought into compliance with a property standards by-law.<sup>159</sup>

There is judicial authority for the proposition that the chief building official is independent of the municipality and bound in law to perform his or her duties entirely independent of any direction or recommendation the municipality may seek to give.<sup>160</sup> However, it is not inappropriate for the chief building official to consult with other officials in the municipality, so long as he or she does not take direction or instruction from them. The problem arises when, as the Court of Appeal has said, those consultations become "interference rather than advice."<sup>161</sup>

Despite this judicial authority, it may be of assistance to both the public and to chief building officials if the statute is clear, unequivocal, and explicit.

**Implementation:** By statutory amendment to the *Building Code Act*.



## The sharing of reports concerning structural capacity, watertightness, and public safety of buildings



### Recommendation 1.19

Owners of a building should be required to keep copies, located electronically or physically in a place other than that of the building itself, of all reports that have been prepared by a professional (professional engineer or architect) about the structural capacity, watertightness, or safety of the building or about any repairs, maintenance, or other remedial action required or performed that relate to the structural capacity, watertightness, or safety of the building (required reports) and provide them to

- (a) any purchaser or other person acquiring an ownership interest in the building, at or before the time of the transfer of title (contracting out of this obligation should not be permitted);
- (b) any person, on request, conducting any inspection, assessment, repair, or renovation of the building pursuant to statutory authority or with the permission of the owner; and
- (c) the municipality at the time of application for a building permit in respect of a portion of the building to which the required reports relate.

**Rationale:** Public safety is protected if building owners, professionals retained to conduct subsequent inspections, and building officials determining whether to issue a building permit all have as much information as possible about the structural condition of the building.

In the 20 years that Algocen owned the Mall, the building was inspected by Trow Consulting Engineers three times, resulting in three reports:

- (a) Trow's first report, in 1991, stated that the design of the parking deck was inappropriate for achieving a watertight condition and recommended either applying a waterproof membrane or removing the concrete and replacing it with a waterproof asphalt-based overlay. If neither procedure was done, the leakage would continue and the deterioration would increase over time. Trow recommended that repairs be carried out as soon as possible to maintain the structural integrity of the slab.<sup>162</sup> Despite being asked, Trow did not provide its opinion on the long-term effects of water on the structural integrity of the building, and Algocen did not follow up.<sup>163</sup>

- (b) In preparing the second report (1994), on the building's future structural integrity, Trow advised Algocen that there was no structural problem "yet" but that the corrosion seen would accelerate exponentially if the leakage was not treated.<sup>164</sup> Algocen did not change its approach.<sup>165</sup> The second report noted rusted steel beams and recommended structural analysis to determine the capacity of the roof slab and discuss various options for waterproofing the deck. It noted that water and salt penetration through joints would cause deterioration of the concrete and steel beams and a likely gradual increase in the amount of concrete debonding on the roof, thus becoming a structural concern.<sup>166</sup> Despite this concern, the actual load capacity following the years of water infiltration was never the subject of an engineering report.<sup>167</sup>
- (c) The third report, in 1995, recommended the installation of a thin membrane waterproofing system.<sup>168</sup> This system was never installed.<sup>169</sup>

In 1996, Trow recommended spot-checking structural steel connections and carrying out welding inspections. Algocen did not do so, nor did it ask any other engineer to provide an opinion on the effect of the water or the likely life of the leaking deck.<sup>170</sup>

Algocen never told the City about its concerns regarding the long-term structural integrity of the parking deck and did not provide any of the Trow reports.<sup>171</sup> Fred Bauthus, the City's chief administrative officer for a number of years, testified that such reports would have been beneficial to the City in order to exercise its regulatory authority.<sup>172</sup>

When Retirement Living was considering whether to buy the building in 1998 and 1999, it retained the architectural firm Nicholls Yallowega Bélanger and the engineering firm Halsall Associates to inspect the building and provide a general assessment of building elements, including the rooftop parking structure. None of the Trow reports was given to these consultants, who all testified they would have helped their work.<sup>173</sup>

The reports the two firms provided to Retirement Living in November 1998 noted there was significant potential for structural damage to have been caused by the many years of ingress of salty water. They recommended further analysis to determine the extent of damage to the building's structure.<sup>174</sup> None of these reports were provided to the City until 2007. I have concluded that the reports were not provided to the directors of Retirement Living when they were considering whether to purchase the Mall. Instead, they were advised by management that the building was "structurally sound."

Before Retirement Living made its final decision to close the purchase from Algocen in the spring of 1999, it received a second report from Halsall, which noted that the corrosion of the steel support beams was minor. It provided this report to the City only in 2007, and the owners continued to treat the leaks with the same maintenance program that had been used since the Mall was opened in 1979.

Paul Officer, Syl Allard, and Bruce Ewald, Elliot Lake's successive chief building officials from 2000 to the time of the collapse, testified that they did not know of the long history of leaks at the Mall before July or October 2006. Mr. Allard and Roger Pigeau, the chief building official from 1980 to 1999, testified that, if they had seen the Trow reports when they were prepared, they would have taken some action.<sup>175</sup>

When Retirement Living sold the Mall to Eastwood in 2005, it did not provide Eastwood with any consultant report. Eastwood did not retain an architect or an engineer to inspect the Mall to report on its physical state before closing the purchase.

The engineering firm Construction Control Inc. was retained by the Royal Bank of Canada, Eastwood's lender, to conduct a condition survey, prepare a condition report, and make recommendations regarding the repair work required. The firm was not provided with any prior consultant reports. The technologist who conducted the inspection along with a professional engineer (not a structural engineer) testified that the firm had been retained to conduct only a visual inspection, with no destructive testing. He said he was told by the Retirement Living employee accompanying him on the inspection that the deck was watertight. The report noted no sign of leaks, such as water-damaged ceiling finishes; had he seen evidence of water damage, he would have recommended additional investigation work. He also testified that if he had seen the Trow or Halsall reports, he would have known there had been a significant leaking problem for the previous 25 years.

If all prior engineering reports dealing with the structural condition of the building had to be shared in the manner I have recommended, then Retirement Living and Eastwood would have known about the serious potential structural issues the building was facing. The engineers they retained would have had the same information and, from the evidence I heard, this knowledge could well have affected the tests they performed and the advice they gave. The chief building official of Elliot Lake would have been provided with those reports when Eastwood applied for a building permit in June 2008. The evidence of at least two former building officials at the City is that, if such information had been available to them, it would have made a difference to the actions they took.

The Professional Engineers of Ontario, in its Practice Bulletin issued after the collapse of the Mall, recommended that engineers conducting a review of an existing building obtain access to copies of prior building assessments as well as maintenance and repair records of buildings being assessed.

The Commission's policy roundtables included discussion about whether prior engineering reports should be widely shared. Ms. Borooah said that the City of Toronto thinks it is useful for purchasers to have information about municipal orders and outstanding matters with the municipality. She noted, however, that this service is a "diminishing business" because purchasers are increasingly relying on title insurance and not requesting information about outstanding municipal issues such as work orders. She agreed that, in principle, the City would benefit from having as much information as possible about the structural condition of the building required to be passed on to purchasers from vendors.<sup>176</sup> Mr. Braithwaite was of the view that requiring this information to be provided to subsequent purchasers would "improve the operation of the marketplace" and also benefit the public because otherwise that information is not going to be available.<sup>177</sup> Mr. Froebelius agreed that this information should be passed on, as long as it was limited to reports dealing with structural and public safety issues (as is my recommendation).<sup>178</sup>

**Implementation:** Implementation of this recommendation would require a statutory amendment. This requirement would not appear to come within the language in the *Building Code Act*, which authorizes the lieutenant governor in council to establish standards for the maintenance and repair of buildings; to establish and govern a program to enforce such standards; or to govern the classes of buildings and the frequency, type, and manner of inspections conducted under such a program.





### **Recommendation 1.20**

**Any person transferring an ownership interest in a building to which the public or employees have access should be required to provide to the purchaser an affidavit in which an authorized person deposes that:**

- (a) the owner has disclosed all required professional reports that have been prepared and provided while the building has been owned by the present owner and that were provided to the owner at or before the time title was taken;**
- (b) the owner has made best efforts to obtain all such reports in respect of the property; and**
- (c) the owner is not aware of any professional reports with respect to the building that relate to structural condition, watertightness, or public safety that have not been disclosed to the purchaser.**

**Rationale:** Public safety will be better protected if disclosure to subsequent owners about the building's condition is as complete as possible.

This practice is another way of ensuring that, to as great an extent as possible, subsequent purchasers of buildings are provided with as much technical information as possible by the previous owner. This requirement would prevent the practice of an owner keeping secret a building's structural defects and selling the problem on to an unwitting purchaser, who is then handicapped in his or her ability to protect public safety.

**Implementation:** Implementing this recommendation would require a statutory enactment.



### **Recommendation 1.21**

**Professional engineers and architects should be required, on request, to make available any records in their possession or control related to the structural integrity of a building to**

- (a) any professional engineer or architect conducting an inspection or assessment on behalf of the owner or with the owner's permission;**
- (b) a prospective purchaser of the building or a professional engineer or architect conducting an inspection or assessment of the building on the prospective purchaser's behalf;**
- (c) a chief building official or an inspector under the *Building Code Act*; and**
- (d) an inspector under the *Occupational Health and Safety Act* in respect of a building that is a place of work to which the Act applies.**

**Rationale:** The engineers who testified before me acknowledged, as I have indicated above, that their work would have been facilitated with knowledge of prior reports and investigations.

**Implementation:** By enactment of a Performance Standard by the Professional Engineers of Ontario under s. 7(1) of the *Professional Engineers Act* requiring that such reports be retained and provided by professional engineers to the specified persons in the circumstances described.

## Municipal record-keeping about complaints of structural issues related to buildings



### Recommendation 1.22

**Municipalities should be required to keep a record, listed by municipal address, of every complaint received by a municipal official of a breach of a property standards by-law, the regulations of the *Building Code Act*, or the *Building Code* that relates to the structural capacity, watertightness, or safety of a building, whether that complaint was received in writing or not. This record should be of the action taken by the municipality and the remedial action taken by the owner and should be in electronic form and easily accessed by any member of the public.**

**Rationale:** Accessibility of records ensures accountability of those entrusted with public safety; accountability enhances responsible decisions.

The City of Elliot Lake has a property standards by-law that had, in its relevant sections, been consistent from the time that the Algo Mall was built. It required that

[e]very part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected.

and that

[t]he roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings.<sup>179</sup>

As discussed earlier, the City of Elliot Lake did not require that the chief building official (who was also the property standards officer) conduct any inspections of buildings in the city after the occupancy permit had been issued, unless a building permit had been applied for. The City formally adopted a complaint-driven policy by City Council resolution in 1995. Even when complaints were made, however, they did not result in an inspection.

Where a municipality has decided that it will generally enforce such a by-law only when a complaint is made, it should be required to put into place a system that requires all such complaints, or at least those complaints that relate to structural capacity, watertightness, and public safety, to be directed to the property standards officer so that he or she can decide what to do about the complaint. The officer should be required to decide what, if anything, to do – whether to investigate; whether, following investigation, to take further steps, including making an order; and whether to take any follow-up actions as a result of those further steps. The fact of the complaint, and the decision(s) of the property standards officer about the complaint, should be recorded on a publicly accessible database. This record should be made whether or not a complaint is in writing, and whether or not it is made to the “right” office. Members of the public should not be required to understand the structure of the bureaucracy or the necessity to put their complaints about public safety of buildings in writing.

Requiring such decisions to be put in writing on a database easily accessible to the public will accomplish two things. It will ensure that the official actually exercises discretion by a conscious decision, and it will allow the public to keep their civic officials accountable for their action (or inaction). Public safety is indisputably the public’s business; there is no justification for not letting members of the public know what decisions are being made (or not made) that will affect their safety.

Perhaps the best example I heard, to explain the necessity for such a public database, came from the evidence about the piece of concrete that fell from Hungry Jack’s restaurant in the Mall. The owner of the restaurant told Councillor Al Collett about it, who in turn told Bruce Ewald, the chief building official. Mr. Ewald did not investigate because it was his practice to ask councillors, in such cases, to have the complainant contact him directly and that did not happen. He testified that he said to Councillor Collett: “What do you want me to do, Al, close down the mall?”<sup>180</sup> I believe that, if he had been required to make a public record of such a complaint and to record what he did (or did not do) and why, it is very likely that he would have investigated and would not have made a decision to do nothing – a decision based on the perceived problems about closing down the Mall.

A similar provision should govern complaints to a municipal official about breaches of the Minimum Structural Maintenance Standard that I have recommended be enacted.

**Implementation:** By including this requirement in the regulation to be enacted under s. 7(1)(b.1) of the *Building Code Act* for complaints of breaches of the Minimum Structural Maintenance Standard; and by enacting amendments to the *Building Code Act* for complaints of breaches of property standards by-laws in respect of the structural capacity, watertightness, or safety of a building.



## The regulation of the engineering and architecture professions



### Recommendation 1.23

**The Professional Engineers of Ontario should issue a clear direction to its members that the contents of an engineering report, or draft report, including a Structural Adequacy Report, should not be altered simply because the client requests that it be changed. Rather, any alteration of an engineering report, or draft report, should be based on sound engineering principles or changed facts.**

**Rationale:** The evidence at the Inquiry indicated that, before finalizing their reports, engineers often sent drafts to the client for comments. There is both a natural and an economic instinct to please the client, but there must be limits.

An extreme case is that of Robert Wood, an engineer with M.R. Wright and Associates. While his licence was suspended, he conducted an inspection of the Mall on April 12, 2012, under the supervision of his colleague, Gregory Saunders. Mr. Wood sent several drafts of his report, including photographs, to the owner at the time, Bob Nazarian. At the request of Mr. Nazarian and without the knowledge of Mr. Saunders, Mr. Wood deleted certain written content and photographs to make the building look better to the potential lenders than it otherwise would have appeared. The value of an independent consultant's report that is provided by the client to third parties is directly related to the consultant's independence. Lenders, insurers, regulators, and others who are given these reports rely on them because they presumably represent an independent, non-biased review of the situation. If the consultant's report can be changed by the client so that the consultant's opinion is affected, or if the building's condition is presented in a more favourable light than the consultant originally intended, it gives a false impression of the consultant's opinion.

The courts have, in the past few years, expressed concern about expert reports submitted in evidence and have taken steps to ensure that expert witnesses are independent of the party retaining them. This initiative has been taken so that the courts can confidently rely on the independence and integrity of expert witnesses. The same can be said for the purpose and reason of this recommendation. It is necessary to provide transparency and to ensure that engineers remain neutral and independent when carrying out an inspection and preparing a Structural Adequacy Report. An engineer who agrees to change the content of a report at the request of a client vitiates that transparency, neutrality, and independence.

I am unable to comment on whether changing reports at the request of a client is a widespread and accepted practice in the industry, or whether only a limited few are engaging in this practice. Whatever the answer, it is a practice that must stop. I want to be clear that the alterations are not those related to grammatical errors, typographical mistakes, or incorrectly stated verifiable facts, but rather are changes requested by a client that serve to alter the findings or conclusions contained in the report or attempt to soften and weaken the language to make the report more attractive to a third party.

Having a clear direction enacted as a regulation will help clarify any confusion over the altering of reports and it will also give engineers a regulation to point to as having the force of law if an owner continues to insist on changes.

**Implementation:** This recommendation should be enacted as a Performance Standard under the authority of s. 7(1)(17) of the *Professional Engineers Act*.



### **Recommendation 1.24**

**The Professional Engineers of Ontario (PEO) should establish a system of mandatory continuing professional education for its members as soon as possible, and in any event no later than 18 months from the release of this Report.**

The goals of the mandatory professional development program to be established by the PEO should include:

- (a) enabling members to maintain their competence;
- (b) enabling members to expand and gain greater expertise and competence in their areas of practice through the provision of courses related to specific disciplines (e.g., concrete and corrosion for structural engineers); and
- (c) providing graduate engineers the opportunity to acquire the additional non-technical skills necessary to become a professional member.

The professional development program should include programs focused on

- (a) the ongoing acquisition of knowledge, skills, and attitudes that increase the effectiveness, competence, and expertise of the engineer;
- (b) mentoring programs to provide the transfer of skills from more experienced members to less experienced ones; and
- (c) ethics and professionalism.

The program should establish a minimum number of hours to be completed, with an obligation for the engineers to report annually on their continuing professional development (CPD) activities to the PEO.

The PEO should consider whether contributions to knowledge will be recognized as fulfilling the CPD requirements. Contributions to knowledge could include:

- (a) drafts of codes and standards for publication;
- (b) publications of papers in peer-reviewed technical journals; or
- (c) publication of a book.

**Rationale:** Building science engineering is a constantly changing and evolving field. It is a self-regulated profession, and continuing education is therefore essential to ensure that an engineer's knowledge is kept current.

As Professor Jag Humar of Carleton University explained during the policy roundtables:

[U]ndergraduate education in engineering is directed at providing problem solving skills and to cover a wide variety of activities a civil engineer needs. There is just not enough time to deal with many specialized subjects. In that context ... continuing education is all the more important, especially for people who are engaged in inspection of buildings, structural sufficiency review, they should definitely have the opportunity to study corrosion and its implications at least at a basic level and if possible at an advanced level.<sup>181</sup>

The PEO does not at this time have a mandatory continuing education program. According to the professionals who attended the roundtables, Ontario and British Columbia are the only provinces that do not have mandatory programs; the remaining eight provinces do.<sup>182</sup> In British Columbia, compliance with the continuing education program is recommended. However, it is not mandatory unless the engineer is a "designated structural engineer," in which case minimum continuing professional development requirements must be met, or else the designation could be revoked.

According to the information provided at the roundtables, the Ontario Architects Association has had a mandatory continuing education program in place for well over a decade.<sup>183</sup>

The professional engineers in Ontario shoulder the heavy burden of protecting the health, safety, and welfare of the public; they are reminded of this burden by the iron ring worn on the little finger of their working hand. Mandatory continuing professional development is common in many professions. In the interest of protecting the health and safety of the public, it is, I believe, essential that professional engineers engage in continuing education.

It was the consensus at the roundtables, whose participants included members of the PEO and the Ontario Society of Professional Engineers (OSPE), that such a program should be adopted. I heard from the OSPE that it currently has a proposal for a mandatory continuing education program before the PEO. According to the OSPE, its proposal is based on the features of other provincial programs that would best suit an Ontario program. The final decision will be made by the PEO because it is the regulator.<sup>184</sup>

Based on the evidence I have heard, it is clear that professional engineers would benefit from the adoption of mandatory continuing education programs as soon as possible. The format of the program and the courses offered must accommodate those engineers who work in small centres without ready access to professional development programming. The PEO must ensure that live streaming is offered to ensure fair and equal access to those located outside major centres. Electronic media now make the delivery of many of those programs practical and affordable.

**Implementation:** The mandatory continuing professional education program for professional engineers should be enacted as a regulation under the authority of s. 7(1)(27) of the *Professional Engineers Act*.





### **Recommendation 1.25**

**Members of the Professional Engineers of Ontario (PEO) should directly and promptly advise clients (past and present) of any suspensions or revocations of their licences, and the reasons therefor, that arise out of disciplinary actions resulting from**

- (a) errors in design;**
- (b) errors in calculations;**
- (c) failure to properly inspect;**
- (d) failure to report an unsafe condition;**
- (e) failure to comply with the requirements of the Structural Adequacy Report; and**
- (f) any and all matters that had a direct or indirect effect on the structural stability of a building or put the health, safety, and welfare of the public at risk.**

**Rationale:** Clients would be able to protect their own interests (and, thereby, public safety) if a suspended member is acting or has acted for them. In the case of former clients, they may be concerned that previous work done by the member without incident should be checked if relevant competence was the issue in the later suspension. There is currently no statutory obligation on a member to inform a client of a licence suspension.

In its submissions on the roundtables, the PEO appeared to be of the opinion that the intent of this recommendation would be addressed through the changes being made to its website that will allow the public and potential clients to easily inform themselves of the discipline history of professional engineers in Ontario. The PEO is of the view that these changes will enhance accessibility of information and help the organization achieve a level of transparency.<sup>185</sup>

I disagree. The current and proposed changes to the PEO website will be insufficient to address the issues sought to be remedied by this recommendation. The position of the PEO assumes a sophisticated and proactive client, who will seek out information on the status of a licensee. This expectation is unrealistic and puts the burden on the client to confirm that the engineer hired to inspect a building or perform some other type of work is properly licensed to do so.

The burden should be placed squarely on the shoulders of the engineers. The *Professional Engineers Act* allows a suspended engineer to continue to work as a “graduate engineer,” provided that he or she is supervised by a properly licensed and qualified engineer. This rule allowed Mr. Wood to continue to provide engineering services long after he had been suspended. Since a client may not know about this rule, I believe it should, therefore, be the responsibility of the engineer to notify a client of a suspension or revocation. The client should not bear the burden of making these inquiries.

The participants at the roundtables did not agree with this recommendation when it was discussed. I acknowledge that some of their concerns related to suspensions arising out of administrative matters. In recognition of those concerns, I believe that the requirement to advise past clients of suspensions and revocations should apply to those suspensions and revocations which arise out of disciplinary actions due to the errors or failures listed in the recommendation.

This requirement will give clients whose buildings were designed or reviewed by an engineer whose licence has been suspended or revoked the opportunity to have the work reviewed by another engineer to ensure that it is compliant with all necessary codes and meets all required standards.

**Implementation:** This recommendation should be enacted as regulations under s. 7(1)(17) of the *Professional Engineers Act* and ss. 7(1)(b.1) and 34(2.1)(b) of the *Building Code Act*.



### Recommendation 1.26

**The Professional Engineers of Ontario (PEO) should provide, for the benefit of the public, the following information on its public website in a format readily and easily searchable by the name of the PEO member:**

- (a) the name of every licensee and every holder of a certificate of authorization;
- (b) the terms, conditions, and limitations attached to the licence or certificate of authorization;
- (c) a note of every revocation, suspension, cancellation, or termination of a licence or certificate of authorization;
- (d) information concerning upcoming Discipline Committee hearings, where a Notice of Hearing has been issued;
- (e) information concerning any findings of professional misconduct or incompetence, for a period of 10 years from the date of the finding(s), so long as the Discipline Committee had ordered publication with names; and
- (f) such other information as the Registration Committee or Discipline Committee directs.

**Rationale:** Public safety requires that the public be aware of the discipline history of engineers because that information could influence hiring decisions.

The PEO confirmed that by the time of its submissions to the roundtable in November 2013, it was possible to determine from its website (through diligent searching) whether a professional engineer's licence was currently suspended or revoked. However, information concerning licence terms, conditions, or limitations was still not posted on the website.<sup>186</sup>

Furthermore, the *Professional Engineers Act* allows the Discipline Committee, which determines allegations of unprofessional behaviour, to direct that its decision may be published without including the name of the member involved.<sup>187</sup>

The public websites of other self-regulating professional bodies in the province include the disciplinary history of their members. The members of any profession covered by the *Health Professions Act, 1991* (physicians, dentists, nurses, pharmacists, psychologists, optometrists, opticians, physiotherapists, and massage therapists) are included,<sup>188</sup> as are lawyers, teachers, and real estate and business brokers.

The evidence before the Commission was that few people knew of the professional status of Mr. Wood at the time of his final inspection or of the revocation of John Kadlec's engineering licence after the Mall had been constructed.<sup>189</sup> It is in the public interest that information such as the status of PEO members and their disciplinary history be readily available on the PEO website.<sup>190</sup>

In its roundtable submissions, the PEO indicated that it had already put in place certain changes to make the disciplinary information of its engineers readily accessible to the public. However, a current review of the website reveals that this information is still difficult to locate and requires members of the public to click on additional links to find the relevant information about the status of an engineer's licence. This information should be immediately available once the name of the engineer in question has been entered into the search engine, without the need to click on additional links.

The PEO continues to allow its members to request that their profile data not be disclosed publicly on its website. This practice results in an engineer still being listed in the directory as a member, with no information on the status of that engineer's licence. This practice must stop. The PEO should no longer allow its members to request that their information be withheld. All members of the PEO should have all their information available for easy access by the public, including disciplinary history, the current status of their licence, their area of practice, their fields of expertise, their education, and their current employment information.

**Implementation:** The Registration Committee of the Professional Engineers of Ontario (PEO) should direct, under s. 21(1) of the *Professional Engineers Act*, that the information to be contained in the registers of licensees include the following information: disciplinary history, current status of licence, area of practice, field(s) of expertise, education, and current employment information. The PEO should make all that information easily available on its website. Paragraph 28(4)(i) of the PEA should be amended to remove the discretion of the Discipline Committee to direct that its decisions not be published or published without reference to the identity of the engineer involved.



### **Recommendation 1.27**

**For the construction of any buildings requiring the services of more than one professional consultant, either a professional engineer or an architect should be designated by the owner or the owner's agent as the prime consultant to perform the roles and responsibilities of that position, as defined by one or the other or both of the Professional Engineers of Ontario (PEO) and the Ontario Association of Architects (OAA).**



**Rationale:** Although the term “prime consultant” appears in both the *Ontario Professional Engineers Act* (s. 12(6)(8)) and the *Ontario Architects Act* (s.11(4)(8)), it has not been defined in either legislation. Nonetheless, it was generally agreed at the roundtable that the role of the prime consultant is one of coordination of all the various professional disciplines involved so as to avoid mistakes and gaps among those disciplines and to achieve a cohesive design. All participants agreed that that role is critical to public safety.

The role and responsibilities of the prime consultant are not defined by statute or regulation; they are, however, typically set out in the contractual documents for the project. This reality creates a power imbalance in favour of the owner in setting the terms of the contracts. It also allows the owner to limit the role and responsibilities of the prime consultant or even to opt out of retaining a prime consultant altogether. As we have seen, limiting – or, worse, forgoing – the coordination role may have serious consequences for the project and for public safety.

The relevance of these recommendations to my mandate arises from evidence that revealed there was no professional engineer or architect retained in the role of prime consultant, responsible for the coordination of the design and construction of the Mall in 1979–80. Following the inspection by Trow engineers of parts of the Mall structure in 1991, the firm reported: “It is our opinion that the design used for the roof slab is inappropriate in achieving a watertight condition over commercial areas.”<sup>191</sup> Had there been a prime consultant designated at the time of the design and construction, the inappropriate design would likely have been rejected and years of water leakage leading to the collapse might have been avoided.

Currently some municipalities in Ontario (such as Ottawa, Mississauga, Halton Hills, Barrie, and Toronto) require that owners applying for a building permit to construct a building similar to the Mall complete and provide a Commitment to General Reviews by Architect and Engineers. Although these forms differ slightly from one municipality to the next, they require that the owner warrant that

- (a) an architect and/or professional engineer has been retained to provide general reviews of the construction;
- (b) all general review reports will be provided promptly to the chief building official; and
- (c) in the event the architect or professional engineer ceases to provide general reviews during construction, the chief building official will be notified immediately, and another architect or engineer will be appointed.

In addition to the undertaking given by the owner, the architect and/or professional engineers from each of the disciplines involved in the project are required to certify to the municipality at the building permit application stage that they have been retained to provide general reviews in accordance with the Performance Standards of the Ontario Association of Architects and/or the Professional Engineers of Ontario. The engineering disciplines required to sign the form include structural, mechanical, electrical, and site services. As noted, the Confirmation of Commitment Forms required to be submitted at the building permit application stage are not consistent from one municipality to the next and do not require that one professional (architect or engineer) take responsibility for the coordination and performance of the general reviews prepared by the various professionals. Also missing from the current requirements is the need for a single engineer or architect to be retained to oversee the coordination and completion of the work of all the professionals retained for the completion of the project.

The Confirmation of Commitment Form is prescribed by those municipalities choosing to implement such a requirement and is enforced through their respective building by-laws. These forms and their contents are not mandated by the *Building Code*. The Code does, however, require the completion of general reviews of the construction of certain categories of buildings, such as the Mall.

The PEO and the OAA agreed at the roundtables that a single coordinating professional should be required to oversee the construction in general and the coordination and performance of the general reviews by the various professionals. They also agreed that an engineer or architect should fill the role of coordinating professional. It was generally agreed that a definition of the role and responsibilities of the prime consultant should be enunciated by the PEO or the OAA, or both organizations, and enacted by a regulation under the relevant provisions of their respective Acts. To do so would bind professional engineers and architects as prime consultants to professional Performance Standards that have the force of law, the breach of which is subject to discipline.

It would also be necessary to bind the owner or the client to the requirement of retaining a single coordinating professional for a project. The consensus of the participants at the roundtables was that, to do so, the *Building Code* should be amended to specify that buildings to which this recommendation applies, requiring the services of more than one professional consultant, shall retain a prime consultant who would be either a professional engineer or an architect.

The participants at the roundtables felt that there is no magic in what the coordinating role is called – be it prime consultant, coordinating consultant, or something else – and I agree. However, the term “prime consultant” is already in the *Professional Engineers Act* (section 12 (6)(8)) and the *Ontario Architects Act* (section 11 (4)(8)), and there would appear to be no reason to change the title.

In British Columbia, the *Building Code* prescribes that Letters of Assurance (LoA), that province’s term for Confirmation of Commitment Forms, are required for the construction of certain categories of buildings. In accordance with the provisions of the BC *Building Code*, LoA are required for the construction of a mall.<sup>192</sup>

The LoA system set out in the BC *Building Code* has been jointly endorsed by the Architectural Institute of British Columbia and the Association of Professional Engineers and Geoscientists of British Columbia. The LoA system can be briefly summarized as follows:

Letters of Assurance are legal accountability documents that are required under the BCBC [BC *Building Code*] 2006, intended to clearly identify the responsibilities of key players in a construction project. Uniform, mandatory Letters of Assurance have been included as Schedules in the BC Building Code since December 1992.<sup>193</sup>

The inspiration for the LoA system established in British Columbia was, to a large extent, the collapse of part of the roof structure at the Station Square Mall in Burnaby on April 23, 1988.

Under the LoA system, the prime consultant role is called the coordinating registered professional. The BC *Building Code* requires the submission of the following four specific Letters of Assurance on a project:

- (a) “Confirmation of Commitment by Owner and Coordinating Registered Professional” – This form must be submitted prior to the issuance of the building permit and requires the owner to confirm the identity of the Coordinating Registered Professional retained for the project and that the Coordinating Registered Professional will coordinate the design work and field reviews. The Coordinating Registered Professional is also required to sign the form;
- (b) “Assurance of Professional Design and Commitment for Field Review” – This form must be submitted prior to the commencement of the construction activities and requires that the Coordinating Registered Professional provide assurances that the design of the referenced components (i.e., structural, electrical, geotechnical, etc.) involved in the project substantially comply with the BCBC and other applicable legislation. The form also provides that the Coordinating Registered Professional undertakes to be responsible for field reviews of the referenced components during construction;



- (c) "Assurance of Coordination of Professional Field Review" – This form is to be submitted after the completion of the project but before the occupancy permit is issued and requires that the Coordinating Registered Professional provide assurances that it has fulfilled all of its obligations in accordance with the relevant provisions of the B.C. *Building Code*; and
- (d) "Assurance of Professional Field Review and Compliance" – This form is to be completed and submitted by each of the professionals involved in the project (i.e., architect, structural engineer, mechanical engineer, electrical engineer, etc.) and requires that they each provide assurances that they have fulfilled their respective obligations in accordance with the relevant provisions of the B.C. *Building Code*.

The codification in the Ontario *Building Code* of an LoA system similar to what currently exists in British Columbia would make retaining a prime consultant mandatory in all municipalities and expand on the requirements that have already been implemented in municipalities through their respective building by-laws. An LoA system would require that all the professionals sign Letters of Assurance, setting out what they intend to do, before the construction begins; and sign further Letters of Assurance after the completion of the construction, confirming they did what they said they would do.

During the construction of the Mall, no professional fulfilled the role of prime consultant. A number of the professionals who testified before me stated that there was a lack of coordination in the construction drawings – most notably, that the structural drawings showed insulation between the concrete topping and the hollow core slabs and the architectural drawings showed the insulation under the hollow core slabs. In addition, because no one had taken on the role of prime consultant, no review was performed to determine how the waterproofing system used for the rooftop parking (the Harry S. Peterson waterproofing system) would interact with the hollow core slabs and the steel structure; or if such an application was appropriate, taking into consideration the harsh winter weather in Elliot Lake and the fact that this system had never been used on hollow core slabs before its proposed use in Elliot Lake.

Furthermore, because of the lack of a prime consultant, no one undertook a full review of the shop drawings and compared them to the requirements set out in the architectural and structural drawings. If such a review had been undertaken by a single professional in the role of prime consultant, the fact that the hollow core slabs adjacent to the Hotel did not have the requisite strength to carry the design load of 130 pounds per square foot (psf) would have been noted, and the question of whether the concrete topping was required to achieve the specified load of 120 psf on the rest of the parking deck would have been properly addressed and rectified, if necessary, at the time of construction. Although a certificate of substantial completion was signed by the architect and the structural engineer on the project, the evidence indicated that no professional performed the general review required by the *Building Code* at the time the Mall was constructed. This situation would not have occurred if a prime consultant, with a mandate outlined in the *Building Code*, had been required and retained.

**Implementation:** The role and responsibilities of the prime consultant should be enacted as a regulation by one or the other or both the Professional Engineers of Ontario and the Ontario Association of Architects under the authority of s. 7(1)(17) of the *Professional Engineers Act* and s. 7(1)(18) of the *Ontario Architects Act*. The Ontario *Building Code* should be amended to (1) define "prime consultant"; (2) require, in sentence 1.2.1., Division C, Part 1, that a prime consultant be retained and be responsible for the design of a building that exceeds 600 square metres in gross area or exceeds three storeys in height for occupancies; (3) require Letters of Assurance for construction of such buildings; and (4) provide that the prime consultant is responsible, as part of the general review required by sentence 1.2.2.1(1), Division C, Part 1, to fulfill the duties and responsibilities as set out in the Letters of Assurance.



## Elliot Lake Retirement Living and its business records



### Recommendation 1.28

**Elliot Lake Retirement Living should be more open and transparent in its business dealings. It should be subject to the *Municipal Freedom of Information and Protection of Privacy Act* and have the same obligation as the City of Elliot Lake to make its records available to the public.**

**Rationale:** Elliot Lake Retirement Living deals with public assets, which it manages for the good of the community. It allowed its penchant for secrecy to inhibit the release to public authorities – City councillors and others – of information that could have been used to require an inspection of and repair to the Mall.

I have concluded that the “culture of secrecy” in which Retirement Living operated, under which it kept to itself information about the state of the roof and the advice it had received about it, imperilled the lives, health, and welfare of the citizens of Elliot Lake.

Retirement Living, which is a not-for-profit corporation created with what were initially public assets (both municipal and provincial) and which acts in what it perceives to be in the best interest of the community, knew of the potential for serious structural harm at the Mall. It knew that, if it spent a significant amount of money, it could solve the leaks and prevent further deterioration. It chose to spend that amount of money, and more, on other things, including enticing a new tenant (Zellers) into the Mall and contributing to the cost of building a new golf course. If the information about the Mall’s condition and the investment decisions of Retirement Living had been available to the public, those decisions might have been different. At a minimum, the public would have had an opportunity to seek to influence Retirement Living’s decisions about how to deal with public assets and whether to invest in fixing the roof.

The imperative to implement this recommendation lies in the City’s admission that it desired to impose confidentiality to *all* deliverables of the agreement, and not only to the retail space database and the retail survey. I can understand that it might have been necessary to impose confidentiality for these two aspects to overcome local business owners’ reticence to participate, but the effect of adding the third deliverable (the physical condition of the Mall) is totally unrelated to that concern. Its inclusion leads to a complete stifling of information essential to carry out the City’s mandate of protecting the public interest.

The *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) has the following purpose, as set out in its first section:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and
  - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.<sup>194</sup>

The Act applies to local government institutions, including municipalities, police services boards, school boards, conservation authorities, boards of health, and transit commissions.\* It also applies to any body listed in Regulation 372/91. Those bodies include many institutions that carry out activities in the public interest – for example, institutions ranging from the Belmont Improvement Area Board of Management; through every corporation established by a municipality to generate, transmit, or sell electricity; to Hamilton Entertainment and Convention Facilities Inc. and the Toronto Atmospheric Fund.

The MFIPPA provides a right of public access to records held by municipalities, subject only to limited and specific exemptions to disclosure. It does not completely open all the records of the institution to public access. For example, documents that contain information supplied in confidence by a third party, where disclosure could prejudice the third party's interests,<sup>195</sup> and information that could prejudice the financial or other specified interests of the institution<sup>196</sup> do not have to be made public.

The MFIPPA also provides a right to access one's own personal information and to correct it if it is inexact, ambiguous, or incomplete. It requires that institutions to which it applies protect personal information contained in their record holdings by imposing protection of privacy requirements governing the proper collection, retention, use, disclosure, and disposal of personal information. In effect, the Act attempts to strike a balance between access to information and the protection of personal privacy.<sup>197</sup>

**Implementation:** This recommendation should be implemented by having the Ontario government amend O Reg 372/91 to include Elliot Lake Retirement Living as an institution subject to the *Municipal Freedom of Information and Protection of Privacy Act*.

## The Ministry of Labour



### Recommendation 1.29

**An employer should be required to notify the Ministry of Labour of any recommendation or complaint that it receives from a Health and Safety representative or a Health and Safety Committee relating to the structural soundness or watertightness of the building in which the workplace is located.**

One of the purposes of the *Occupational Health and Safety Act* is to facilitate what the Ministry of Labour refers to as the internal responsibility system.<sup>198</sup> The premise of this system is that workplace parties have a responsibility on a day-to-day basis to oversee issues relating to health and safety in the workplace. The intention of this regime is to ensure that any health and safety problems in a workplace are reported to the employer

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\* *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 2(1) ("institution"). The *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, in contrast, applies to provincial ministries and most provincial agencies, boards, and commissions, as well as community colleges, universities, local health integration networks (LHINs), and hospitals.

and can thereby be rectified to the extent possible without any intervention by the Ministry of Labour.<sup>199</sup> A key component of the internal responsibility system is the requirement that workplaces of a certain size have either health and safety representatives or a Joint Health and Safety Committee.\*

Health and safety representatives and Joint Health and Safety committees have a series of powers under the *Occupational Health and Safety Act*, including the power to make recommendations to the employer for improving health and safety.<sup>200</sup>

I recommend that employers be required to notify the ministry of any complaint or recommendation received under ss. 8(10), 9(18), or 9(19) of the *Occupational Health and Safety Act* if it relates to the structural soundness or watertightness of the building in which the workplace is located.

**Rationale: The Ministry of Labour will be in a better position to assess possible contraventions of the *Occupational Health and Safety Act* in particular workplaces.**

The internal responsibility system places an onus on the employer to respond to any recommendations made by a health and safety representative or a Health and Safety Committee.<sup>201</sup> However, as noted, there is no obligation on the employer under the *Occupational Health and Safety Act* to provide any information to the Ministry of Labour in respect of recommendations that are made by a representative or committee. Rather, the expectation is that the employer will address and rectify the health and safety concerns presented to it.

In contrast, an employer is obligated to notify the Ministry of Labour about other occurrences in the workplace, including where a person is killed or critically injured at a workplace;<sup>202</sup> and where a person is disabled or requires medical attention because of an accident, explosion, fire, or incident of workplace violence.<sup>203</sup> In my view, this obligation to notify the Ministry of Labour ought to be expanded to include worker concerns about structural adequacy of the workplace.

When it is notified about such a recommendation or complaint, the Ministry of Labour should be required to determine if an inspection is required. During such an inspection, a Ministry of Labour inspector, in order to carry out his or her duties, should have broad powers to view and require the production of any document. This power should include the production of recommendations of a health and safety representative or committee and the minutes of the committee meetings. If a Ministry of Labour inspector observes that problems are not remedied, he or she should be authorized to order that the employer take further measures to address the issue.

Under the current regime, if the designated health and safety representative notes concerns about possible contraventions relating to structural soundness or watertightness of a building, the Ministry of Labour may become aware of them only if an inspector consults with the representative or reviews his or her records during an inspection, or if a complaint is made directly to the ministry.

The evidence I have heard convinces me that there are clear deficiencies with this regime. More specifically, I heard evidence about numerous occasions when the Zellers Health and Safety Committee noted the impact of water infiltration into the store as a health and safety concern and recommended, in one form or another, that the source of it be fixed.<sup>204</sup> I viewed ample documentary evidence that Zellers management was well aware of the workers' concerns about leakage in the Mall.<sup>205</sup> Unfortunately, the Ministry of Labour never became aware of

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\* Workplaces with six to 19 employees must have a health and safety representative. Workplaces with 20 to 49 employees must have a Joint Health and Safety Committee composed of at least one worker and one manager representative. Workplaces of 50 or more employees must have a Joint Health and Safety Committee composed of at least four members, two from management and two from non-management staff. Certain members must be certified; certification entails basic and specific training in workplace safety.



such concerns through the internal responsibility system. It appears that the employer attempted to work with the current Mall owner (Eastwood) to address the workers' concerns. However, as the evidence has clearly shown, those efforts were entirely in vain. Moreover, Ministry of Labour inspectors did not inspect the Zellers store in the Mall while these numerous recommendations from the Health and Safety Committee sat unaddressed.

I appreciate the rationale and intention of the internal responsibility system. As a general matter, it seems to be an efficient manner of promoting safe and hazard-free workplaces in Ontario. However, the evidence that I heard in the course of the Commission's hearings revealed weaknesses in the internal responsibility system and gaps in the administration and enforcement of the *Occupational Health and Safety Act*. The employer seemingly attempted to discharge its own obligations by attempting to work with the Mall owner to address the problem – to utterly no avail. With the Ministry of Labour in the dark, the workers' clarion call that the roof leaks should be fixed was not answered. This weakness is a critical gap in the legislative framework.

The purpose of this recommendation is to ensure that the Ministry of Labour has knowledge of worker concerns that may reflect materially hazardous conditions related to the structural soundness or watertightness of a building in which a worker's place of employment is located. By requiring an employer to notify the Ministry of Labour of any complaints or recommendations that an employer receives which relate to structural soundness or watertightness of the building, the ministry will then be in a position to follow up with the employer or the workers as necessary to ensure that any problems are remedied. Specifically, I would expect that

- (a) when the Ministry of Labour receives a complaint or recommendation which reflects a possibly urgent or severe situation in a workplace, the ministry will treat it as a complaint that would trigger an inspection by a ministry inspector; and
- (b) when the Ministry of Labour receives multiple or repeated recommendations or complaints relating to structural soundness or watertightness, indicating that the employer has not addressed the problem, it will conduct an inspection of the workplace.

Moreover, this information will allow the Ministry of Labour to broaden the scope of potential "high-priority" workplaces so it can determine the relative urgency of inspections. The ministry will be armed with case-specific information about workplaces located in buildings that demand a high-priority status for inspections. This point will be more fully discussed below.

This recommendation is intended to prevent similar situations from "slipping under the radar" because the ministry's attention is devoted to other types of workplaces, where accidents and injuries are more common. Building collapses are infrequent events – it is unlikely that it would be possible to predict when one will happen simply on the basis of the frequency of individual occurrences in the past. Absent an obligation to notify, it continues to be likely that the Ministry of Labour will not be made aware of at-risk workplaces.

**Implementation:** Amend the *Occupational Health and Safety Act* to require notification in these circumstances.



### **Recommendation 1.30**

**On receipt of a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard in a building that is a workplace, the chief building official in the municipality where the workplace is located should be required to forward that report to the Ministry of Labour as soon as practical, but in any event no later than 20 days after it is received.**

**The Ministry of Labour should refer to these Structural Adequacy Reports in determining the priority of workplaces that will receive proactive inspections.**

As noted, the Ministry of Labour carries out proactive inspections and reactive inspections. The proactive inspections are unannounced and based on certain criteria. Ontario's approximately 430 inspectors are responsible for more than 200,000 workplaces and five to six million employees in the province.

With so many workplaces and so few inspectors, the Ministry of Labour must prioritize the workplaces to be inspected,<sup>206</sup> and I accept that fact. The ministry generally takes a risk-based approach to the allocation of resources in conducting proactive inspections. It considers certain factors, including the kind of work being done, the size of the workplace, previous history with respect to non-compliance, and injury rates.<sup>207</sup>

**Rationale: The Ministry of Labour will receive information about workplaces that may need to be subject to proactive inspections on a high-priority basis.**

The Ministry of Labour determines which workplaces it will inspect most frequently through a system intended to ensure that the most problematic places are inspected most frequently. Its prioritization system, however, does not properly account for structural adequacy or maintenance issues about the building in which the workplace is located.

The Ministry of Labour considers retail to be a low-risk sector. The large national retail operations, in particular, are considered very low risk because they typically have detailed occupational health and safety policies and practices and active Joint Health and Safety committees. The retail sector is, therefore, not visited as often as sectors characterized as higher-risk workplace areas.<sup>208</sup>

By requiring a chief building official to forward a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard to the Ministry of Labour, the ministry will be armed with direct information about the structural adequacy of buildings in which workplaces are located. With this information, the ministry would have better information, enabling a more effective prioritization of workplaces deserving proactive inspections.

Although the Mall had tenants that included businesses operating on a national scale, among them Zellers, Scotiabank, and Foodland, and had chronic problems of water infiltration for more than 30 years, it was never designated a high-priority workplace by the Ministry of Labour. It is my hope that, with the implementation of this recommendation, similarly compromised buildings that house workplaces which would otherwise not be on the Ministry of Labour's radar will get the attention they require to protect the health and safety of workers in Ontario.

**Implementation:** By including such an obligation in the regulation enacted under s. 7(1)(b.1) of the *Building Code Act* to enforce the Minimum Structural Maintenance Standard.



### Recommendation 1.31

**There should be minimum standards for Ministry of Labour inspectors when they are conducting an inspection in response to a complaint regarding the structural soundness, watertightness, or structural safety of a building in which a workplace is located.**

Ministry of Labour inspectors have broad investigative powers under the *Occupational Health and Safety Act*. However, neither the *Occupational Health and Safety Act* nor its regulations prescribe minimum Performance Standards for those inspections.

I recommend that minimum standards be imposed on inspectors when they are conducting an inspection in response to a complaint regarding the structural soundness, watertightness, or structural safety of a building in which a workplace is located. Specifically, when conducting a reactive inspection in response to such a complaint, the inspector should be required to do the following:

- (a) Inspect the entire building about which the complaint was made.
- (b) Make inquiries of employees who work in the building for information regarding the complaint, including inquiries about the length of time that the subject of the complaint has persisted.
- (c) Make inquiries of the jurisdiction's chief building official or Building Department official to determine whether the problems complained of have persisted over a period of time.
- (d) Identify whether a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard has been issued about the building where the workplace is located.
- (e) If the problems complained of have persisted for a significant period, consult with a Ministry of Labour engineer.

**Rationale:** The imposing of minimum standards will ensure that adequately comprehensive inspections of workplaces are carried out.

I am mindful that there are hundreds of thousands of different workplaces in Ontario for which the Ministry of Labour is responsible to ensure the health and safety of workers. Given that diversity, I do not recommend that there should be a one-size-fits-all approach to the conduct of inspections under the *Occupational Health and Safety Act*. I also note that the Ministry of Labour has guidelines in place which, although not mandatory, are meant to assist inspectors in the conduct of inspections.<sup>209</sup> However, I heard sufficient evidence in the course of the Commission's hearings to conclude that, where the Ministry of Labour receives a complaint that relates to the structural soundness, watertightness, or structural safety of a building in which a workplace is located, an inspector ought to be required to fulfill minimum standard requirements in investigating that complaint.



On December 15, 2011, the Ministry of Labour received an anonymous complaint about the health and safety of the workers at the Mall due to “mold, roof leaking and unsafe escalator.”<sup>210</sup> As I have earlier concluded, the investigation carried out by the ministry’s inspector, Ed Hudson, in response to this complaint was cursory at best. Given the nature of that complaint, I am of the view that Mr. Hudson should have taken the steps described above.

By requiring the inspector to conduct an inspection of the entire building, the inspector will more likely identify any concerns giving rise to the complaint and will not have to draw potentially inaccurate inferences resulting from a more limited inspection.

By requiring the inspector to make inquiries of individuals in the building and the chief building official for information related to the subject matter of the complaint, he or she will be more likely to confirm whether a contravention exists and its severity.

By requiring the inspector to consult a Ministry of Labour engineer if the problem giving rise to the complaint has persisted over a period of time, he or she will better be able to make an informed decision about both the severity of the contravention and the appropriate orders that should be issued.

Without such minimum standards, there is clearly too much discretion left in the hands of the inspector. Minimum standards would provide necessary clarity and direction to Ministry of Labour inspectors conducting investigations of complaints that may reflect a serious threat to the health and safety of Ontario workers.

**Implementation:** The *Occupational Health and Safety Act* should be amended to authorize a regulation to prescribe standards to be followed by inspectors conducting inspections under the Act, as well as a regulation requiring that inspections be carried out in accordance with the standards described.



### **Recommendation 1.32**

**The Ministry of Labour should notify the relevant chief building official of any information that it receives regarding contraventions or possible contraventions of the *Occupational Health and Safety Act* relating to**

- (a) the structural soundness of a workplace;**
- (b) the watertightness of a workplace; and**
- (c) whether a building in which a workplace is located is unsafe.**

For the purposes of this recommendation, information includes each of the following:

- (a) complaints that are received by the Ministry of Labour directly;
- (b) information or observations made by a Ministry of Labour inspector or engineer in the course of any visit or inspection of a workplace; and
- (c) any information received from an employer in accordance with the employer’s reporting obligations to the Ministry of Labour.

**Rationale:** Notification will provide chief building officials with relevant information necessary to the performance of their duties.

As noted earlier in these recommendations, the *Building Code Act* is enforced by municipalities, and each municipality is required to appoint a chief building official and inspectors as are necessary for the enforcement of the *Building Code Act* in the particular municipality. However, certain provisions of the *Occupational Health and Safety Act* and its regulations also address the issue of structural adequacy.<sup>211</sup> Accordingly, there is a role for the Ministry of Labour to play in ensuring the health and safety of workplaces as they relate to the structural soundness, the watertightness, and the safety of the buildings in which Ontarians work.

Currently, a Ministry of Labour inspector may, at his or her discretion, or as directed by the inspector's manager, refer an issue involving a suspected *Building Code* contravention to a municipal building inspector or a regional Ministry of Labour engineer.<sup>212</sup> However, collaboration between the ministry and a municipality is not required.

With this recommendation, I am not in any way alleviating the obligations and responsibilities of the Ministry of Labour to enforce the *Occupational Health and Safety Act* and its regulations. Rather, to better ensure the safety of Ontario's workers, there should be better communication between municipal building officials and Ministry of Labour officials.

**Implementation:** The *Occupational Health and Safety Act* should be amended to include such a requirement for notification.



### Recommendation 1.33

**Ministry of Labour inspectors should receive more comprehensive training on issues related to structural soundness, watertightness, and building safety.**

**Rationale:** Enhanced training will ensure that Ministry of Labour inspectors have sufficient awareness of potential hazards relating to structural soundness, watertightness, and structural safety.

The training period for industrial inspectors is about six months. The training program includes in-class instruction about the *Occupational Health and Safety Act* and its regulations. Training also includes field work in which a trainee shadows a more experienced inspector to observe and evaluate the performance of the inspector's duties in the field. Industrial inspectors must pass written exams based on their in-class instruction.<sup>213</sup>

I heard evidence that the training of Ministry of Labour inspectors related to structural adequacy is limited to "hazard identification and to what to do if they see something questionable and how to get assistance to resolve those issues."<sup>214</sup> I heard evidence that suggests that some Ministry of Labour inspectors were not adequately aware of the potential hazards to structural adequacy that are posed by water infiltration. For example, Ralph Regan, a Ministry of Labour inspector who carried out inspections of workplaces in the Mall, testified that he did not think water infiltration, as evidenced by stained ceiling tiles and complaints of suspected mould growth, could be a contravention of the *Occupational Health and Safety Act* because he did not actually observe any water entering the building.<sup>215</sup>

As the tragedy of the collapse of the Algo Mall demonstrated, structural capacity and soundness are fundamental to a safe workplace. Accordingly, the training that the Ministry of Labour's industrial inspectors receive should be more comprehensive in relation to potential hazards involving the structural soundness, watertightness, and structural safety of a building in which workplaces are located.

**Implementation:** The Ministry of Labour should institute such training programs.



## Summary of Recommendations


### Minimum structural maintenance standards for buildings

#### Recommendation 1.1

There should be province-wide minimum structural maintenance standards for all buildings in Ontario.

#### Recommendation 1.2

The regulation outlined in Recommendation 1.1 should include a requirement that all buildings be watertight, structurally sound, and not unsafe, and be maintained in such a way as to keep them in that condition for a reasonable period (the “Minimum Structural Maintenance Standard”).



### Inspections of buildings to ensure compliance with the Minimum Structural Maintenance Standard

#### Recommendation 1.3


All owners of buildings should be required to ensure that their buildings are inspected periodically (a “prescribed structural inspection”) by a professional engineer to determine whether they comply with the Minimum Structural Maintenance Standard and what steps, if any, need to be taken to bring them into compliance.

#### Recommendation 1.4

For buildings to which these Recommendations apply, the Professional Engineers of Ontario (PEO) should enunciate a Performance Standard for the prescribed structural inspection.

#### Recommendation 1.5

The prescribed structural inspection should be conducted in accordance with the Performance Standard by a structural engineering specialist who has met the Professional Engineers of Ontario (PEO) qualifications and requirements to be so certified.



### Reports of inspections to ensure compliance with the Minimum Structural Maintenance Standard

#### Recommendation 1.6


After conducting a structural inspection in accordance with the Professional Engineers of Ontario Performance Standard, the structural engineering specialist should complete a Structural Adequacy Report to determine whether the building meets the Minimum Structural Maintenance Standard and, if it does not, to describe what repairs and maintenance are required in order for the building to meet that standard.

#### Recommendation 1.7

The Structural Adequacy Report should be provided to the owner of the building and simultaneously filed on a publicly accessible registry called the Structural Condition Registry.

#### Recommendation 1.8

If the structural engineer concludes that the condition of the building does not meet the Minimum Structural Maintenance Standard, he or she should be required to provide a copy of the Structural Adequacy Report, which must set out the repairs or maintenance required to rectify the situation, to the municipality’s chief building official.



## Enforcing the Minimum Structural Maintenance Standard

### Recommendation 1.9

The chief building official of each municipality should have the authority to issue an order requiring repairs to a building that does not meet the Minimum Structural Maintenance Standard.

### Recommendation 1.10

After receiving a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard, the chief building official should be required, as soon as practicable but no later than 10 business days after receipt, to determine whether to

- (a) issue an order requiring repair of the building so as to remedy the unsafe condition and the period within which the repairs must be conducted;
- (b) order that the building be closed; or
- (c) make no order.

### Recommendation 1.11

If the chief building official decides to issue an order requiring repair of a building, in the situation described in Recommendation 1.10, that order, together with written reasons therefor, should be served on the owner of the building and filed on the Structural Condition Registry. If the official decides not to issue an order requiring repair of the building, he or she must issue a written document explaining why no such order is required, and that document should be served on the owner and filed on the Structural Condition Registry.

### Recommendation 1.12

If the chief building official issues an order requiring repair of the building to bring it into compliance with the Minimum Structural Maintenance Standard, that order should provide a date by which the repair must be completed. If the repair is not completed within that period, the chief building official should have the authority, and should have to decide, whether to

- (a) prohibit the use or occupancy of the building;
- (b) cause the building to be renovated or repaired or demolished to bring it into compliance with the Minimum Structural Maintenance Standard or take such other action as he or she considers necessary for the protection of the public; or
- (c) take no further action.

Municipalities should be required to create and maintain a system which ensures that necessary information about these orders is recorded, maintained, and brought forward at the appropriate time to the relevant officers to ensure that time-sensitive operations are properly performed.

### Recommendation 1.13

The decision of the chief building official under Recommendation 1.12 should be in writing, served on the owner, and filed on the Structural Condition Registry.

### Recommendation 1.14

Where the municipality undertakes work under an order as outlined in Recommendation 1.12, the municipality should have a lien on the land for the amount spent on the renovation or repair.



## Frequency of inspection to determine compliance with the Minimum Structural Maintenance Standard

### Recommendation 1.15

A prescribed structural inspection should be required, and the resulting Structural Adequacy Report registered on the Structural Condition Registry, at the following times:

- (a) when a building is sold;
- (b) when the chief building official of the municipality in which the building is located requires it by an order in writing;
- (c) when repairs required by an order of the chief building official to bring it into compliance with the Minimum Structural Maintenance Standard are completed; and
- (d) in any event no later than at a period of time after the last prescribed structural inspection (a time to be established after a report from the advisory panel (see Recommendation 1.16).

If a prescribed structural inspection is not carried out and registered on the Structural Condition Registry within an appropriate time, the chief building official of the municipality in which the building is located should be required to have the inspection carried out, and the cost of the inspection should be added to the property tax bill of the building owner.

### Recommendation 1.16

An advisory panel should be established as soon as possible to determine the appropriate classes of buildings, grouped by risk and the consequences of failure, and to make recommendations no later than 12 months from the release of this Report, on the following:

- (a) which classes of buildings should be given priority for the initial periodic inspection;
- (b) the time within which each class of buildings should have had an initial periodic inspection; and
- (c) the appropriate period within which each class of building should be inspected on a periodic basis.



## Standards for building officials in Ontario municipalities

### Recommendation 1.17

The existing standards for training and certification of building officials and inspectors under the *Building Code Act* should be amended to require mandatory continuing education.

### Recommendation 1.18

The *Building Code Act* should be amended to provide that building officials and inspectors are public office holders who are independent of the municipal council, but that it is entirely appropriate for the council or the chief administrative officer of the municipality to direct a concern to the attention of the building official to be dealt with as he or she sees fit.





## The sharing of reports concerning structural capacity, watertightness, and public safety of buildings

### Recommendation 1.19

Owners of a building should be required to keep copies, located electronically or physically in a place other than that of the building itself, of all reports that have been prepared by a professional (professional engineer or architect) about the structural capacity, watertightness, or safety of the building or about any repairs, maintenance, or other remedial action required or performed that relate to the structural capacity, watertightness, or safety of the building (required reports) and provide them to

- (a) any purchaser or other person acquiring an ownership interest in the building, at or before the time of the transfer of title (contracting out of this obligation should not be permitted);
- (b) any person, on request, conducting any inspection, assessment, repair, or renovation of the building pursuant to statutory authority or with the permission of the owner; and
- (c) the municipality at the time of application for a building permit in respect of a portion of the building to which the required reports relate.

### Recommendation 1.20

Any person transferring an ownership interest in a building to which the public or employees have access should be required to provide to the purchaser an affidavit in which an authorized person deposes that:

- (a) the owner has disclosed all required professional reports that have been prepared and provided while the building has been owned by the present owner and that were provided to the owner at or before the time title was taken;
- (b) the owner has made best efforts to obtain all such reports in respect of the property; and
- (c) the owner is not aware of any professional reports with respect to the building that relate to structural condition, watertightness, or public safety that have not been disclosed to the purchaser.

### Recommendation 1.21

Professional engineers and architects should be required, on request, to make available any records in their possession or control related to the structural integrity of a building to

- (a) any professional engineer or architect conducting an inspection or assessment on behalf of the owner or with the owner's permission;
- (b) a prospective purchaser of the building or a professional engineer or architect conducting an inspection or assessment of the building on the prospective purchaser's behalf;
- (c) a chief building official or an inspector under the *Building Code Act*; and
- (d) an inspector under the *Occupational Health and Safety Act* in respect of a building that is a place of work to which the Act applies.



## Municipal record-keeping about complaints of structural issues related to buildings

### Recommendation 1.22

Municipalities should be required to keep a record, listed by municipal address, of every complaint received by a municipal official of a breach of a property standards by-law, the regulations of the *Building Code Act*, or the *Building Code* that relates to the structural capacity, watertightness, or safety of a building, whether that complaint was received in writing or not. This record should be of the action taken by the municipality and the remedial action taken by the owner and should be in electronic form and easily accessed by any member of the public.



## The regulation of the engineering and architecture professions

### Recommendation 1.23

The Professional Engineers of Ontario should issue a clear direction to its members that the contents of an engineering report, or draft report, including a Structural Adequacy Report, should not be altered simply because the client requests that it be changed. Rather, any alteration of an engineering report, or draft report, should be based on sound engineering principles or changed facts.

### Recommendation 1.24

The Professional Engineers of Ontario (PEO) should establish a system of mandatory continuing professional education for its members as soon as possible, and in any event no later than 18 months from the release of this Report.

### Recommendation 1.25

Members of the Professional Engineers of Ontario (PEO) should directly and promptly advise clients (past and present) of any suspensions or revocations of their licences, and the reasons therefor, that arise out of disciplinary actions resulting from

- (a) errors in design;
- (b) errors in calculations;
- (c) failure to properly inspect;
- (d) failure to report an unsafe condition;
- (e) failure to comply with the requirements of the Structural Adequacy Report; and
- (f) any and all matters that had a direct or indirect effect on the structural stability of a building or put the health, safety, and welfare of the public at risk.

### Recommendation 1.26

The Professional Engineers of Ontario (PEO) should provide, for the benefit of the public, the following information on its public website in a format readily and easily searchable by the name of the PEO member:

- (a) the name of every licensee and every holder of a certificate of authorization;
- (b) the terms, conditions, and limitations attached to the licence or certificate of authorization;
- (c) a note of every revocation, suspension, cancellation, or termination of a licence or certificate of authorization;
- (d) information concerning upcoming Discipline Committee hearings, where a Notice of Hearing has been issued;
- (e) information concerning any findings of professional misconduct or incompetence, for a period of 10 years from the date of the finding(s), so long as the Discipline Committee had ordered publication with names; and
- (f) such other information as the Registration Committee or Discipline Committee directs.

**Recommendation 1.27**

For the construction of any buildings requiring the services of more than one professional consultant, either a professional engineer or an architect should be designated by the owner or the owner's agent as the prime consultant to perform the roles and responsibilities of that position, as defined by one or the other or both of the Professional Engineers of Ontario (PEO) and the Ontario Association of Architects (OAA).

**Elliot Lake Retirement Living and its business records****Recommendation 1.28**

Elliot Lake Retirement Living should be more open and transparent in its business dealings. It should be subject to the *Municipal Freedom of Information and Protection of Privacy Act* and have the same obligation as the City of Elliot Lake to make its records available to the public.

**The Ministry of Labour****Recommendation 1.29**

An employer should be required to notify the Ministry of Labour of any recommendation or complaint that it receives from a Health and Safety representative or a Health and Safety Committee relating to the structural soundness or watertightness of the building in which the workplace is located.

**Recommendation 1.30**

On receipt of a Structural Adequacy Report that describes breaches of the Minimum Structural Maintenance Standard in a building that is a workplace, the chief building official in the municipality where the workplace is located should be required to forward that report to the Ministry of Labour as soon as practical, but in any event no later than 20 days after it is received. The Ministry of Labour should refer to these Structural Adequacy Reports in determining the priority of workplaces that will receive proactive inspections.

**Recommendation 1.31**

There should be minimum standards for Ministry of Labour inspectors when they are conducting an inspection in response to a complaint regarding the structural soundness, watertightness, or structural safety of a building in which a workplace is located.

**Recommendation 1.32**

The Ministry of Labour should notify the relevant chief building official of any information that it receives regarding contraventions or possible contraventions of the *Occupational Health and Safety Act* relating to

- (a) the structural soundness of a workplace;
- (b) the watertightness of a workplace; and
- (c) whether a building in which a workplace is located is unsafe.

**Recommendation 1.33**

Ministry of Labour inspectors should receive more comprehensive training on issues related to structural soundness, watertightness, and building safety.



## Notes

- <sup>1</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1.
- <sup>2</sup> *Building Code Act*, 1992, SO 1992, c 23, ss 1(1), 8(1).
- <sup>3</sup> *Building Code Act*, 1992, SO 1992, c 23, s 8(2).
- <sup>4</sup> *Ontario Building Code*, O Reg 332/12, Division A, Part 2, s. 2.2.1.1(1), table 2.2.1.1, column 2, number OS2.
- <sup>5</sup> *Ontario Building Code*, O Reg 332/12, Division B, Part 4, s. 4.1.5.3(1), table 4.1.5.3, and s. 4.1.5.12.
- <sup>6</sup> *Ontario Building Code*, O Reg 332/12, Division B, Part 4, s. 4.1.6.
- <sup>7</sup> *Ontario Building Code*, O Reg 332/12, Division B, Part 4, s. 4.1.7.2.
- <sup>8</sup> *Ontario Building Code*, O Reg 332/12, Division B, Part 4, s. 4.1.8.
- <sup>9</sup> *Ontario Building Code*, O Reg 332/12, Division C, Part 1, s. 1.2.2.1(1).
- <sup>10</sup> *Ontario Building Code*, O Reg 332/12, Division C, Part 1, s. 1.2.2.1(2).
- <sup>11</sup> *Building Code Act*, 1992, SO 1992, c 23, s 3(1).
- <sup>12</sup> *Building Code Act*, 1992, SO 1992, c 23, s 3(2).
- <sup>13</sup> *Building Code Act*, 1992, SO 1992, c 23, s 8(1).
- <sup>14</sup> *Ontario Building Code*, O Reg 332/12, Division C, Part 1, s. 1.2.2.1(3).
- <sup>15</sup> *Ontario Building Code*, O Reg 332/12, Division C, Part 1, s. 1.3.1.3(1).
- <sup>16</sup> *Building Code Act*, 1992, SO 1992, c 23, s 10.2; *Ontario Building Code*, O Reg 332/12, Division C, Part 1, para 1.3.5.1.
- <sup>17</sup> *Ontario Building Code*, O Reg 332/12, Division C, Part 1, ss. 1.3.3.1, 1.3.5.1(o) and (p).
- <sup>18</sup> *Building Code Act*, 1992, SO 1992, c 23, ss 11, 12.
- <sup>19</sup> *Building Code Act*, 1992, SO 1992, c 23, s 34(2).
- <sup>20</sup> SO 2006, c 22, s 112(4), enacting the new s 7(1)(b.1) of the *Building Code Act*, 1992.
- <sup>21</sup> SO 2006, c 22, s 112(8), enacting the new s 15.10.1 of the *Building Code Act*, 1992.
- <sup>22</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, s 15.9.
- <sup>23</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, s 15.10.
- <sup>24</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, s 15.9(2).
- <sup>25</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, ss 15.9(6), (7), (8), (9), (10).
- <sup>26</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, s 15.10.
- <sup>27</sup> *Building Code Act*, 1992, SO 1992, c 23, as amended, s 15.8(1)(d).
- <sup>28</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 25(1)(e).
- <sup>29</sup> *Occupational Health and Safety Act*, RRO, Reg 851, s 120.
- <sup>30</sup> *Occupational Health and Safety Act*, RRO, Reg 851, s 72.
- <sup>31</sup> Exhibit 4125, pp. 006–007.
- <sup>32</sup> Dennis testimony, April 30, 2013, pp. 7492–4.
- <sup>33</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 54(1)(m).
- <sup>34</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, ss 8(6), (7), (10).
- <sup>35</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, ss 8(12), (13).
- <sup>36</sup> *Ontario Schools for the Blind and the Deaf*, RRO 1990, Reg 296, s 18(k).
- <sup>37</sup> *Operation of Schools – General*, RRO 1990, Reg 298, s 11(3)(l).
- <sup>38</sup> *General Regulation*, O Reg 166/11, s 19(1).
- <sup>39</sup> *General Regulation*, O Reg 166/11, s 58.1.
- <sup>40</sup> *Retirement Homes Act*, 2010, SO 2010, c 11, s 90.
- <sup>41</sup> *Standards for Bridges*, O Reg 104/97, as amended, ss 1, 2(3), 2(4), 3.
- <sup>42</sup> *Condominium Act*, 1998, SO 1998, c 19, ss 94(1), 94(4); *General Regulation under the Condominium Act*, 1998, O Reg 48/01, s 31(3).
- <sup>43</sup> *General Regulation under the Condominium Act*, 1998, O Reg 48/01, s 29(1), 30(2), 32.
- <sup>44</sup> O Reg 517/06, *Maintenance Standards*, ss 5, 6, 7.
- <sup>45</sup> *Residential Tenancies Act*, 2006, SO 2006, c 17, s 224(1).
- <sup>46</sup> *Residential Tenancies Act*, 2006, SO 2006, c 17, ss 225, 234(t).
- <sup>47</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.1(3).
- <sup>48</sup> Chart prepared by Ministry of Municipal Affairs and Housing, Appendix to Research paper, “Property Maintenance and Repair: Policies, Regulations, Legislation and By-Laws”; available on the Commission’s website at [http://elliottlakeinquiry.ca/roundtables/pdf/Property\\_Maintenance\\_and\\_Repair\\_with\\_Appendix.pdf](http://elliottlakeinquiry.ca/roundtables/pdf/Property_Maintenance_and_Repair_with_Appendix.pdf).
- <sup>49</sup> Research paper, “Property Maintenance and Repair: Policies, Regulations, Legislation and By-Laws” on Commission’s website: [http://elliottlakeinquiry.ca/roundtables/pdf/Property\\_Maintenance\\_and\\_Repair\\_with\\_Appendix.pdf](http://elliottlakeinquiry.ca/roundtables/pdf/Property_Maintenance_and_Repair_with_Appendix.pdf).
- <sup>50</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.2(1)(a).
- <sup>51</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.8(1)(a).
- <sup>52</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.8(1)(d), (e).
- <sup>53</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.8(1)(f).
- <sup>54</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.2(2).
- <sup>55</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.4(1).
- <sup>56</sup> *Building Code Act*, 1992, SO 1992, c 23, s 15.4; *Municipal Act*, 2001, SO 2001, c 25, s 1(3).
- <sup>57</sup> Research paper, “Property Maintenance and Repair: Policies, Regulations, Legislation and By-Laws”: [http://elliottlakeinquiry.ca/roundtables/pdf/Property\\_Maintenance\\_and\\_Repair\\_with\\_Appendix.pdf](http://elliottlakeinquiry.ca/roundtables/pdf/Property_Maintenance_and_Repair_with_Appendix.pdf).
- <sup>58</sup> Research paper, “Property Maintenance and Repair: Policies, Regulations, Legislation and By-Laws”: [http://elliottlakeinquiry.ca/roundtables/pdf/Property\\_Maintenance\\_and\\_Repair\\_with\\_Appendix.pdf](http://elliottlakeinquiry.ca/roundtables/pdf/Property_Maintenance_and_Repair_with_Appendix.pdf).
- <sup>59</sup> Research paper, “Property Maintenance and Repair: Policies, Regulations, Legislation and By-Laws”: [http://elliottlakeinquiry.ca/roundtables/pdf/Property\\_Maintenance\\_and\\_Repair\\_with\\_Appendix.pdf](http://elliottlakeinquiry.ca/roundtables/pdf/Property_Maintenance_and_Repair_with_Appendix.pdf); City of London, Revised By-Law L-6, *Business Licensing By-Law* (19 September 2011), s 2.23.
- <sup>60</sup> *Public Health Act*, RSA 2000, c P-37, ss 1(ee)(ii), 59.
- <sup>61</sup> *Public Health Act*, RSA 2000, c P-37, s 62.
- <sup>62</sup> *Housing Regulation*, Alta Reg 173/99, ss 1, 3.
- <sup>63</sup> *Housing Regulation*, Alta Reg 173/99, ss 1, 4; *Minimum Housing and Health Standards*, <http://www.health.alberta.ca/documents/Standards-Housing-Minimum.pdf>, s 1, p. 5.
- <sup>64</sup> *Institutions Regulation*, Alta Reg 143/1981, s 6.
- <sup>65</sup> *Child Care Licencing Regulation*, Alta Reg 143/2008, s 5.
- <sup>66</sup> *Dwellings and Buildings Regulation*, Man R 322/88R, s 9(1).
- <sup>67</sup> *Safety Code*, RRQ, c B-1, r 3, s 345.
- <sup>68</sup> *Safety Code*, RRQ, c B-1, r 3, s 386.
- <sup>69</sup> *Safety Code*, RRQ, c B-1, r 3, ss 371, 372.

- <sup>70</sup> *Safety Code*, RRQ, c B-1, r 3, ss 373, 374.
- <sup>71</sup> Quebec, National Assembly, *Journal des débats de l'Assemblée nationale*, 39th Parl, 1st Sess, vol. 41, no. 158 (23 Nov 2010) (Lise Thériault).
- <sup>72</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 2(3).
- <sup>73</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 2(4).
- <sup>74</sup> Ontario *Building Code*, O Reg 332/12, Division C, Part I, s. 1.2.2.1.
- <sup>75</sup> Ontario *Building Code*, O Reg 332/12, Division C, Part I, s. 1.2.2.
- <sup>76</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 7(1)17.
- <sup>77</sup> Regulation 941/90, s 78.
- <sup>78</sup> Regulation 260/08, ss 2, 3.
- <sup>79</sup> Regulation 260/08, s 2(1).
- <sup>80</sup> *Building Code Act, 1992*, SO 1992, c 23, s 1(1).
- <sup>81</sup> Exhibit 5331, para 34.
- <sup>82</sup> Exhibit 5331, para 45.
- <sup>83</sup> Exhibit 5160.
- <sup>84</sup> Bulletin, Exhibit 5160.
- <sup>85</sup> Regulation 941, s 72(2)(g).
- <sup>86</sup> Regulation 941, s 72(2)(d).
- <sup>87</sup> Exhibit 5331, para 86.
- <sup>88</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 2(4).
- <sup>89</sup> Regulation 941, RRO 1990, s 72(2)(h).
- <sup>90</sup> Exhibit 5331, para 99.
- <sup>91</sup> Professional Engineers of Ontario, Draft Terms of Reference Continuing Professional Development, Competency, and Quality Assurance Task Force, March 21, 2014, [http://www.peo.on.ca/index.php/ci\\_id/27779/la\\_id/1.htm](http://www.peo.on.ca/index.php/ci_id/27779/la_id/1.htm); M. Mastromatteo, "Decision time for PEO on continuing professional development," *Engineering Dimensions* 31, 2 (March / April 2010): 28.
- <sup>92</sup> M. Mastromatteo, "Decision time for PEO on continuing professional development," *Engineering Dimensions* 31, 2 (March / April 2010): 28.
- <sup>93</sup> Professional Engineers of Ontario, Draft Terms of Reference Continuing Professional Development, Competency, and Quality Assurance Task Force March 21, 2014, [http://www.peo.on.ca/index.php/ci\\_id/27779/la\\_id/1.htm](http://www.peo.on.ca/index.php/ci_id/27779/la_id/1.htm).
- <sup>94</sup> Regulation 941, RRO 1990, s 77.
- <sup>95</sup> Exhibit 5331, para 74.
- <sup>96</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 28.
- <sup>97</sup> Part 1, Written submissions of the PEO, para 37.
- <sup>98</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 7(1)(22).
- <sup>99</sup> Part 1, Written submissions of the PEO, para 53.
- <sup>100</sup> *Building Code Act, 1992*, SO 1992, c 23, s 1; Ontario *Building Code*, O Reg 332/12, Division A, Part 1, s 1.4.1.2(1)(a),.
- <sup>101</sup> Ontario *Building Code*, O Reg 332/12, Division A, Part 1, s 1.4.1.2(1) (c).
- <sup>102</sup> Ontario *Building Code*, O Reg 332/12, Division A, Part 1, s 1.4.1.2(1)(c).
- <sup>103</sup> Ontario *Building Code*, O Reg 332/12, Division A, Part 1, s 1.4.1.2(1)(c).
- <sup>104</sup> *Building Code Act, 1992*, SO 1992, c 23, s 15.1(3), as amended by SO 1997, c 24, s 224(8).
- <sup>105</sup> Dean Findlay transcript, November 18, 2013, p. 21; Warwick Perrin, Ontario Association of Property Standards Officers, transcript, November 18, 2013, p. 23; Stuart Huxley transcript, November 18, 2013, p. 40; Michael Ostfield transcript, November 18, 2013, p. 46; J. Lorne Braithwaite transcript, November 19, 2013, pp. 81–2.
- <sup>106</sup> Stuart Huxley, transcript, November 18, 2013, p. 37.
- <sup>107</sup> Dean Findlay, transcript, November 18, 2013, p. 21; Warwick Perrin, transcript, November 18, 2013, p. 23; Stuart Huxley, transcript, November 18, 2013, p. 40; Randal Froebelius, transcript, November 18, 2013, p. 49.
- <sup>108</sup> Ontario, Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Report, *Deterioration of parking structures* (Toronto: Ministry of Housing, 1988), 13; attached as app. B to the Commission's Procedural Order No. 9.
- <sup>109</sup> App. B to Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, p. 6. In its Supplemental submissions in response to my Procedural Order No. 9, dealing with issues surrounding the late discovery of this report – by way of an anonymous letter after the hearings had concluded – the Ontario government attached, among other things, the complete report of the Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages. Appendix B to those submissions is the "Executive Summary" of the report, appendix C is chapter 1, "Overview"; appendix D is chapter 2, "The Deterioration Problem and Inspection Techniques"; appendix E is chapter 3 "Repair Methods"; appendix F is chapter 4, "Maintenance and Monitoring Procedures"; appendix G is chapter 5, "Enforcement Procedures"; and appendix H is chapter 6, "Development of a Communication Strategy".
- <sup>110</sup> Ontario, Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Report, *Deterioration of parking structures* (Toronto: Ministry of Housing, 1988).
- <sup>111</sup> Province of Ontario, Submissions in response to Procedural Order No. 9, p. 1.
- <sup>112</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, p. 2.
- <sup>113</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. C, chap 1, p.6.
- <sup>114</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. C, chap. 5, p. 12.
- <sup>115</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. H, chap 6, p.3..
- <sup>116</sup> Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, app. H, chap 6, pp. 5–.
- <sup>117</sup> Memo, July 28, 1988, to David Hodgson, Director, Buildings Branch, from Ali Arlani, Technical Policy Advisor, attached as app. A to Province of Ontario, Supplemental submissions in response to Procedural Order No. 9, p. 3; *Building Action Newsletter*, July 1988, attached as app. G to Province of Ontario, Submissions in response to Procedural Order No. 9, p. 35.
- <sup>118</sup> *Building Code Act, 1992*, SO 1992, c 23, s 34(2)(b), as amended by SO 2006, c 22, s 112(10).
- <sup>119</sup> SO 2006, c 17.
- <sup>120</sup> O Reg 517/06, *Maintenance Standards*, s 5.
- <sup>121</sup> O Reg 517/06, *Maintenance Standards*, ss 6, 7.
- <sup>122</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 25(1)(e).
- <sup>123</sup> Ann Boroah, transcript, November 18, 2013, p. 31.
- <sup>124</sup> SO 1992, c 23, as amended by SO 2002, c 9, s 26.
- <sup>125</sup> Exhibit 6-6, ss 5.1, 5.4(a); Exhibit 6-7, ss 4(1)(a), 5(1)(a).
- <sup>126</sup> Michael Ostfield, transcript, November 18, 2013, p. 86.

- <sup>127</sup> Stuart Huxley, transcript, November 18, 2013, pp. 60–4.
- <sup>128</sup> Ann Borooh, transcript, November 18, 2013, pp. 27–9.
- <sup>129</sup> Randal Froebelius, transcript, November 18, 2013, p. 73.
- <sup>130</sup> Peter Sharpe, transcript, November 18, 2013, pp. 71–2.
- <sup>131</sup> PEO, *Structural engineering assessments of existing buildings*, Professional Practice Bulletin, Regulatory No. 2, November 2012, pp. 1–2.
- <sup>132</sup> PEO Roundtable responses, pp. 11–12.
- <sup>133</sup> NORR Panel testimony (Saffarini), May 29, 2013, pp. 12261–6.
- <sup>134</sup> Exhibit 5347, p. 6.
- <sup>135</sup> Association of Professional Engineers and Geoscientists of British Columbia (APEGBC), *Designated Structural Engineer Application Guide*, Version 15 (May 2011), p. 3.
- <sup>136</sup> APEGBC, *Designated Structural Engineer Application Guide*, Version 15 (May 2011), pp. 4–5.
- <sup>137</sup> APEGBC, *Designated Structural Engineer Application Guide*, Version 15 (May 2011), pp. 13–14.
- <sup>138</sup> APEGBC, *Designated Structural Engineer Application Guide*, Version 15 (May 2011), p. 3.
- <sup>139</sup> Roundtable transcript, November 20, 2013, p. 90.
- <sup>140</sup> General, RRO 1990, Reg 941, s 72(2)(c).
- <sup>141</sup> <http://www.ontario.ca/environment-and-energy/brownfields-redevelopment>.
- <sup>142</sup> Lous D. Brandeis, “What Publicity Can Do,” *Harper’s Weekly*, December 20, 1913; <http://www.law.louisville.edu/library/collections/brandeis/node/196>.
- <sup>143</sup> Ann Borooh, transcript, November 19, 2013, p. 55.
- <sup>144</sup> Stuart Huxley, transcript, November 19, 2013, pp. 69–71.
- <sup>145</sup> Brenda Lewis, transcript, November 19, 2013, p. 57.
- <sup>146</sup> Randal Froebelius, transcript, November 19, 2013, pp. 79–80.
- <sup>147</sup> Alan Shaw, transcript, November 19, 2013, pp. 80–1.
- <sup>148</sup> J. Lorne Braithwaite, transcript, November 19, 2013, pp. 82–3.
- <sup>149</sup> Peter Sharpe, transcript, November 18, 2013, p. 131.
- <sup>150</sup> Peter Froebelius, transcript, November 18, 2013, p. 73.
- <sup>151</sup> Dean Findlay, transcript, November 18, 2013, p. 102.
- <sup>152</sup> Ann Borooh, transcript, November 18, 2013, p. 120.
- <sup>153</sup> Michael Ostfield, transcript, November 18, 2013, p. 167.
- <sup>154</sup> Peter Sharpe, transcript, November 18, 2013, p. 168.
- <sup>155</sup> *Building Code Act, 1992*, SO 1992, ss 15.8(1), as amended by SO 1997, c 24, s 224(8), 18(1); SO 2002, c 23, as amended by SO 1997, c 30, Schedule B, s 11.
- <sup>156</sup> Ann Borooh, transcript, November 18, 2013, p. 98.
- <sup>157</sup> Brenda Lewis, transcript, November 18, 2013, pp. 105–16.
- <sup>158</sup> *Building Code Act, 1992*, s 15.11(1), SO 1992, c 23, as amended by SO 2002, c 9, s 27.
- <sup>159</sup> Ewald testimony, May 24, 2012, pp. 11544–50.
- <sup>160</sup> *Peter Kiewit Sons Co. v Tillsonburg (Town)*, [2002] OJ No 1497 at para 82 (SCJ).
- <sup>161</sup> *Pedwell v The Corp. of the Town of Pelham*, 2003 CanLII 7488 at para 56 (OCA).
- <sup>162</sup> Exhibit 35, pp. 13–17.
- <sup>163</sup> Rod Caughill testimony, March 13, 2013, p. 1544.
- <sup>164</sup> Exhibit 611.
- <sup>165</sup> Rod Caughill testimony, March 13, 2013, pp 1611–13.
- <sup>166</sup> Exhibit 44, pp. A, 15.
- <sup>167</sup> Rod Caughill testimony, March 14, 2013, pp. 1678–9.
- <sup>168</sup> Exhibit 50, pp. 697–9.
- <sup>169</sup> Rod Caughill testimony, March 14, 2013, pp. 1681–5; Leistner testimony, March 27, 2013, pp. 3385–7.
- <sup>170</sup> Leistner testimony, March 27, 2013, pp. 3381–2.
- <sup>171</sup> Leistner testimony, March 27, 2013, p. 3431.
- <sup>172</sup> Bauthus testimony, March 26, 2013, p. 3060.
- <sup>173</sup> Celli testimony, April 5, 2013, p. 4254; Buckley testimony, April 8, 2013, p. 4389; Truman testimony, April 9, 2013, p. 4530; Luciw testimony, April 10, 2013, pp. 4747–8.
- <sup>174</sup> Exhibit 67, pp. 012–13.
- <sup>175</sup> Allard testimony, April 29, 2013, p. 7040; Pigeau testimony, March 22, 2013, pp. 2599–2601.
- <sup>176</sup> Ann Borooh, transcript, November 19, 2013, pp. 97–9.
- <sup>177</sup> J. Lorne Braithwaite, transcript, November 19, 2013, p. 101.
- <sup>178</sup> Randal Froebelius, transcript, November 19, 2013, pp. 101–2.
- <sup>179</sup> Exhibit 6-6, s 5.1, 5.4(a); Exhibit 6-7, ss 4(1)(a), 5(1)(a).
- <sup>180</sup> Ewald testimony, May 27, 2013, p. 11772.
- <sup>181</sup> Jag Humar, transcript, November 20, 2013, p. 174.
- <sup>182</sup> Roundtable transcript, November 20, 2013, p. 165.
- <sup>183</sup> Roundtable transcript, November 20, 2013, p. 168.
- <sup>184</sup> Roundtable transcript, November 20, 2013, pp. 160–6.
- <sup>185</sup> Roundtable transcript, November 20, 2013, pp. 115–18.
- <sup>186</sup> PEO roundtable responses, pp. 19–20.
- <sup>187</sup> *Professional Engineers Act*, RSO 1990, c P.28, s 28(4)(i).
- <sup>188</sup> *Regulated Health Professions Act, 1991*, SO 1991, c 18, Schedule 2 (*Procedural Code*) ss 23(2) 7, 8, 9, 10; 23(5).
- <sup>189</sup> Officer testimony, April 23, 2013, pp. 6292, 6297.
- <sup>190</sup> PEO roundtable responses, p. 20.
- <sup>191</sup> Exhibit 35, p. 13.
- <sup>192</sup> *British Columbia Building Code*, BC Reg 264/2012, s 2.2.7 in Part 2 of Division C.
- <sup>193</sup> *British Columbia, Guide to the Letters of Assurance in the B.C. Building Code 2006* (Victoria: Ministry of Public Safety and Solicitor General, Building and Safety Standards Branch, December 2010), p. 3.
- <sup>194</sup> *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 1.
- <sup>195</sup> *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 10.
- <sup>196</sup> *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 11.
- <sup>197</sup> *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 1; Information and Privacy Commissioner, Ontario, *Working with the Municipal Freedom of Information and Protection of Privacy Act, A Councillor’s Guide* (Ottawa: November 2001).
- <sup>198</sup> Exhibit 4125.
- <sup>199</sup> Hudson testimony, July 8, 2013, pp. 14735–6, 14741–2.
- <sup>200</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, ss 8(10), 9(18), 9(19).
- <sup>201</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, ss 8(12), 9(20).
- <sup>202</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 51(1).
- <sup>203</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 52(1).



<sup>204</sup> See Exhibits 12-16, 12-9, 12-10, 12-46, 12-12.

<sup>205</sup> See Exhibits 12-23, 12-26.

<sup>206</sup> Exhibit 4123.

<sup>207</sup> Dennis testimony, April 30, 2013, pp. 7493–4.

<sup>208</sup> Exhibit 4125, p.009.

<sup>209</sup> See Exhibit 4122.

<sup>210</sup> Exhibit 749.

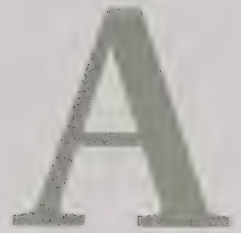
<sup>211</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1, s 25(1)(e).

<sup>212</sup> Exhibit 4125, p. 012.

<sup>213</sup> Exhibit 4125, p. 012.

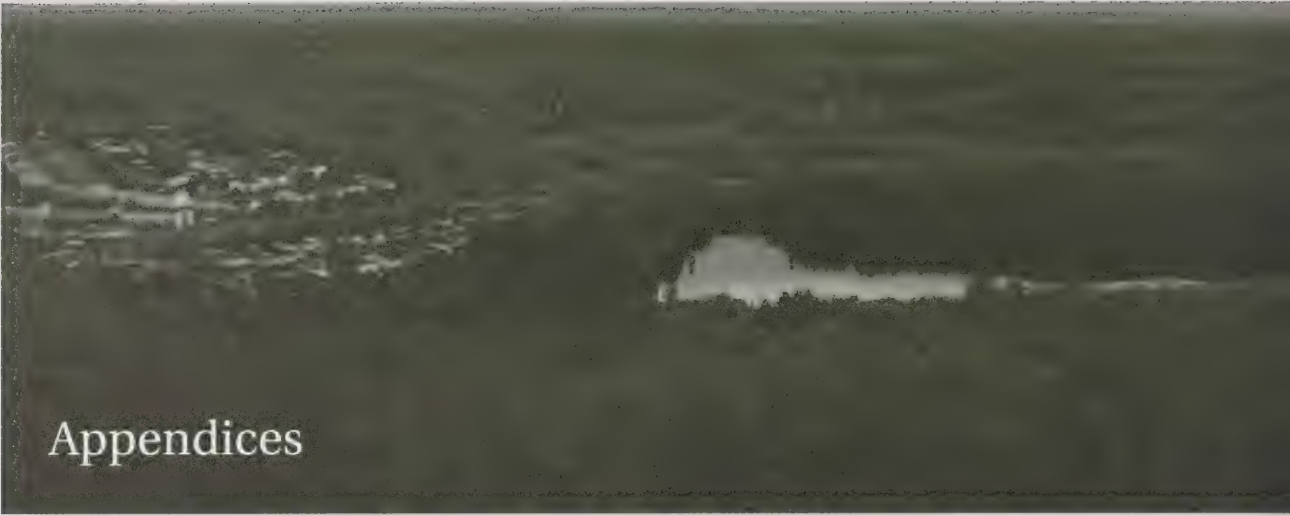
<sup>214</sup> Dennis testimony, April 30, 2013, pp. 7487–8.

<sup>215</sup> Regan testimony, June 6, 2013, pp. 13007–8.



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## Appendix A – Key dates in the history of the Algo Mall

**March 14, 1979:** Algocen Realty purchases the land on which the Algo Mall will be built from the Town of Elliot Lake for \$118,700.

**August 5, 1980:** The architect and engineer sign the certificate of substantial completion for the Mall.

**June 18, 1999:** Algocen sells the Mall to 1309900 Ontario Ltd. [NorDev] for \$4 million.

**August 8, 2005:** NorDev / Retirement Living sells the Mall to Eastwood Mall Inc. for \$6.2 million.

**October 24, 2006:** The City of Elliot Lake issues a Notice of Violation and Order to Conform to the *Ontario Fire Code* to the owners of the Mall.

**September 25, 2009:** The City of Elliot Lake issues an Order to Remedy under the City's Property Standards By-law requiring that a series of deficiencies at the Mall be remedied.

**February 11, 2010:** The City rescinds the property standards order.

**May 2011:** A piece of concrete falls from the ceiling at Hungry Jack's in the Mall.

**May 2012:** Engineer Robert Wood indicates in a report to Eastwood Mall Inc. that "no visual signs of structural distress were observed" at the Mall.

**June 23, 2012:** The rooftop parking deck of the Mall collapses. Two people are killed and 19 injured.

**June 29, 2012:** The Ontario government announces that a public inquiry into the collapse will be called.

**July 9, 2012:** Hon. Paul R. Bélanger is named Commissioner of the Elliot Lake Inquiry.

## Appendix B – Key people in the history of the Algo Mall

This list sets out the names and relevant positions of some of the people who played a role in the history of the Mall, including this Commission.

\*An asterisk indicates those who testified before the Commission

**Allard, Syl**, chief building official (September 2002–May 2008), City of Elliot Lake\*

**Barnes, Ken**, firefighter, Elliot Lake Fire Department

**Bauthus, Fred**, chief administrative officer (February 1990–July 2000, September 2007–June 2010), City of Elliot Lake\*

**Bear, Rhonda**, Mall manager (May 2011–June 2012), Eastwood Mall Inc.\*

**Beltramin, Randy**, engineer, STEM Engineering

**Bouffard, Dan**, Mall manager, Eastwood Mall Inc. (early 2006–July 2006)

**Buckley, Michael**, engineer, Halsall Associates\*

**Burling, Larry**, deputy clerk (April 1978–July 1985), clerk (August 1985–February 1999), City of Elliot Lake\*

**Caughill, Bruce**, architect and engineer, Caughill Consulting\*

**Caughill, Rod**, construction superintendent (started January 1986), development supervisor (currently), Algoma Central Properties\*

**Celli, Albert**, engineer, Halsall Associates\*

**Clinckett, John**, architect\*

**Cloughley, Barbara**, personnel manager (1983–June 1992), Woolco store (former tenant in Algo Mall)\*

**Clouthier, Chris**, building inspector and property standards officer (September 2004– ), City of Elliot Lake\*

**Collett, Al**, councillor (March 2008– ), City of Elliot Lake; master electrician, Amp Electrical\*

**Comeau, Robert**, employee, Zellers (tenant in Algo Mall)

**Connors, Darren**, firefighter, Elliot Lake Fire Department

**Cresswell, Peter**, former chief executive officer, Algoma Central Properties

**Croteau, Terry**, councillor (1997–2000; 2002–3), City of Elliot Lake

**Croxson, Katherine**, former chair, Elliot Lake Public Library Board

**Cunningham, Albert E.J.**, roofing consultant, A.E.J. Cunningham Consultants Ltd.

**Cuthbertson, Brian**, manager, Zellers (tenant in Algo Mall)\*

**Davison, Jim**, commercial mortgage specialist, Royal Bank of Canada

**Day, Glen**, contractor, Peak Restoration\*

**deBortoli, Robert**, various positions at Water/Waste Treatment Plant (1985–2004), acting and director of operations (2004–10), chief operating officer (October 2010–March 2011), acting and chief administrative officer (January 2011– ), City of Elliot Lake\*

**Dell'Aquila, Domenic**, certified engineering technologist, Trow Consulting Engineers Ltd.\*

**Denley, Don**, councillor (2003–6), City of Elliot Lake\*

**Derreck, Tom**, chief administrative officer (October 2006–July 2007), City of Elliot Lake\*

- Elliott, William**, general manager, ELNOS\*
- England, Brian**, Mall manager, Eastwood Mall Inc. (February 2008–July 2008)\*
- Ewald, Bruce**, chief building official (July 2008– ), City of Elliot Lake\*
- Fabris, Antoine-René**, lawyer for Eastwood Mall Inc.\*
- Farkouh, George**, councillor (1985–8), mayor (1988–2006), City of Elliot Lake\*
- Fazekas, Barbara**, chief librarian (March 1981–May 1983, July 1988–August 2006), Elliot Lake Public Library\*
- Gagnon, Daniel**, director of project tourism and leisure (2003–10), chief administrative officer (June 2010–February 2011), City of Elliot Lake
- Gruhl, Robert**, chief building official (until 1980), City of Elliot Lake
- Guertin, Rhona**, finance and business development manager (1997– ), Elliot Lake Retirement Living\*
- Hamilton, Richard**, councillor (1999–2006), mayor (2006– ), City of Elliot Lake\*
- Hammond, Joe**, Mall maintenance worker, Eastwood Mall Inc.
- Harman, Doug**, vice-president and general manager, Coreslab Inc.\*
- Hass, Jaime**, certified engineering technologist, Pinchin Environmental Ltd.\*
- Hellyer, David**, engineer Coreslab Inc.
- Hirt, Nicholas**, vice-president, Algoma Central Properties
- Holford, Andrew**, engineer, Kleinfeldt Consultants\*
- Hollick, Frank**, building inspector (1978–80), City of Elliot Lake
- Hudson, Ed**, inspector (1984–2012), Ontario Ministry of Labour\*
- Hurmizi, Sam**, accountant for Eastwood Mall Inc.
- Iamonaco, Remy**, engineer, Trow Consulting Engineers Ltd.\*
- Jasskelainen, Henry**, former employee, Harry S. Peterson Inc.\*
- Jeffreys, Roger**, occupation health and safety inspector (2004–7), regional engineer (2007–10), provincial engineer (2010– ), Ontario Ministry of Labour\*
- Kadlec, John J.**, engineer, Beta Engineering Group Ltd.\*
- Karaluk, Ed**, engineer, Coreslab Inc.
- Kennealy, Richard**, general manager (1993– ), Elliot Lake Retirement Living\*
- Keywan, James W.**, architect\*
- Kodeda Peter**, architect, Beta Engineering Group Ltd.
- Kovacevic, Tom**, real estate developer
- Kukoraitis, Dennis**, former treasurer, acting chief administrative officer (July–October 2006), City of Elliot Lake
- LaBreche, Al**, former Mall maintenance worker, Elliot Lake Retirement Living and Eastwood Mall
- Laddell, Bonnie**, resident of Elliot Lake
- Lalande, Rachelle**, former employee, SAAN (tenant in Algo Mall)
- Laroue, Henrieth**, administrative assistant (September 2007–February 2008), assistant Mall manager (February–July 2008), Mall manager (July 2008–May 2011), Eastwood Mall\*
- LeBlanc, Ray**, former Mall maintenance worker, Elliot Lake Retirement Living and Eastwood Mall Inc.
- Leddy, Andrea**, personnel director, City of Elliot Lake
- Leistner, Robert**, general manager (1990–7), vice president (1997–2010), Algoma Central Properties\*
- Liautaud, Larry**, former Mall general manager, Algoma Central Properties



**Liu, Eric**, engineer, Alex Tobias Associates Limited

**Luciw, Michael A.**, architect, Yallowega Bélanger (formerly Nicholls Yallowega Bélanger)\*

**MacDonald, Brian**, manager, Building Assessment Department, CCI Group (formerly Construction Control)\*

**MacLean, Virginia**, lawyer to City of Elliot Lake

**McCowan, Ron**, McCowan and Associates\*

**McCulloch, Judy**, manager of customer service, Scotiabank (former tenant Algo Mall)\*

**McGurk, Pat**, chief librarian (August 2009– ), Elliot Lake Public Library

**McTaggart, Kathy**, councillor (2003–6), City of Elliot Lake, member of Elliot Lake Public Library Board

**Menzies, Judy**, former chair, Elliot Lake Public Library Board

**Meyer, Paul**, engineer, P. Meyer Engineering\*

**Milani-Nia, Majid**, engineer, Pinchin Environmental Ltd.

**Mitchell, Paul**, architect

**Monroe, David**, former vice president, Harry S. Peterson Inc.\*

**Morin, Suzanne**, chief librarian (June 2006–August 2009), Elliot Lake Public Library

**Nazarian, Bob**, president and shareholder, Eastwood Mall Inc.\*

**Nazarian, Irene**, wife of Bob Nazarian

**Nazarian, Levon**, leasing manager and real estate advisor, Eastwood Mall Inc.\*

**Nicholls, Blaine**, architect (ret.), former principal, Nicholls Yallowega Bélanger\*

**Officer, Paul**, building inspector (September 1981–November 1999), acting and chief building official (November 1999–February 2002), fire chief (June 2002– ), City of Elliot Lake\*

**Pappoulas, Peter**, former Mall general manager, Algoma Central Properties

**Perkins, Mike**, civil engineer, City of Elliot Lake

**Pigeau, Roger**, chief building official (August 1980–November 1999), City of Elliot Lake\*

**Pinnell, Ward**, construction manager for the Algo Centre project, Algoma Central Properties

**Quinn, Richard**, property manager (1990/1–2010), Elliot Lake Retirement Living\*

**Quinte, Elaine**, co-owner of Hungry Jack's Restaurant (tenant in Algo Mall)\*

**Quinte, Jack**, co-owner of Hungry Jack's Restaurant (tenant in Algo Mall)

**Rastin, Ken**, councillor (2006– ), City of Elliot Lake

**Regan, Ralph**, inspector (1981–2005), Ontario Ministry of Labour\*

**Reinhardt, Scot**, councillor (2000–10), City of Elliot Lake

**Saari, Sonia**, chief engineer, Coreslab Inc.\*

**Sarvinis, Philip**, engineer, Read Jones Christofferssen\*

**Saunders, Gregory**, engineer, M.R. Wright and Associates\*

**Sennett, Alex**, consultant, Eastwood Mall Inc.\*

**Shaikh, Shahid**, engineer, Coreslab Inc.

**Sherrard, Ashley**, broker, EIR Investments Inc. Brokerage\*

**Snow, Ken**, former Mall maintenance supervisor, Algoma Central Properties and Elliot Lake Retirement Living\*

**Souliere, Doug**, councillor (2002–10), City of Elliot Lake

**Speck, Troy**, councillor (1994–9), executive assistant to the chief administrative officer (1999–2000), deputy chief administrative officer (2000–1), chief administrative officer (2001–July 2006), City of Elliot Lake\*

**Sprague, Lesley**, secretary to the clerk (1991–9), deputy clerk (1999–2002), clerk (January 2002– ), City of Elliot Lake\*

**Stirling, Bob**, Chemnorth Quest Enterprises

**Taylor, Janet**, former chair, Elliot Lake Public Library Board

**Taylor, Roger**, reeve/mayor (1970–88), City of Elliot Lake

**Thomson, Alistair B.**, project manager, Algoma Central Properties

**Truman, Jeff**, engineer, Halsall Associates (1995–9)\*

**Turner, Tom**, Mall manager (July 2006–February 2008), Eastwood Mall\*

**Willey, Jim**, former Mall general manager, Algoma Central Properties

**Wing Yan**, bookkeeper, Eastwood Mall Inc.

**Topp, R.G.**, vice-president finance, Algoma Central Properties

**Vaillancourt, Pierre**, owner, Foodland (tenant in Algo Mall)

**Wood, Robert**, former engineer, M.R. Wright and Associates\*

**Yakimov, Dimitri**, former employee, Eastwood Mall Inc.\*

## Appendix C – Historical spreadsheet

	ALGO CENTRE MALL		CITY OF ELLIOT LAKE	
	Owner	Employees	Mayor	Employees
1979	Algoma Central Properties	VP: N. Hirt Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Robert Gruhl Library CEO: Diane Lehman
1980	Algoma Central Properties	VP: N. Hirt Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau (from August) Library CEO: Diane Lehman
1981	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer (from September) Library CEO: Diane Lehman (until April) Library CEO: Barbara Fazekas (from March)
1982	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Building Inspector: Scott Sutherland Library CEO: Barbara Fazekas
1983	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Building Inspector: Scott Sutherland Library CEO: Barbara Fazekas (until May) Library CEO: Marzio Apolloni (from April)
1984	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Marzio Apolloni
1985	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell Mall Manager: Larry Liautaud B. Jones	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Marzio Apolloni
1986	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Ward Pinnell (until April) Construction Superintendent: Robert Caughill (after January 26) Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Marzio Apolloni
1987	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Marzio Apolloni
1988	Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liautaud	Roger Taylor	Chief Administrative Officer: John Sven Bloom Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Marzio Apolloni (until July) Library CEO: Barbara Fazekas (from July)



ALGO CENTRE MALL		CITY OF ELLIOT LAKE	
Owner	Employees	Mayer	Employees
1989 Algoma Central Properties	VP: N. Hirt Comptroller: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: John Sven Bloom (until December) Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1990 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus (from February) Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1991 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1992 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1993 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1994 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1995 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1996 Algoma Central Properties	General Manager: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1997 Algoma Central Properties	VP: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1998 Algoma Central Properties	VP: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas
1999 Pre-June 17: Algoma Central Properties Post-June 18: Retirement Living and NORDEV	Pre June 17: VP: Robert Leistner Construction Superintendent: Robert Caughill Mall Manager: Larry Liataud Post June 17: Property Manager: Richard Quinn Comptroller: Rhona Guertin General Manager: Richard Kennealy	George Farkouh	Chief Administrative Officer: Fred Bauthus Chief Building Official: Roger Pigeau Building Inspector: Paul Officer Library CEO: Barbara Fazekas

	ALGO CENTRE MALL		CITY OF ELLIOT LAKE	
	Owner	Employees	Mayor	Employees
2000	Retirement Living and NORDEV	<b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy	George Farkouh	<b>Chief Administrative Officer:</b> Fred Bauthus until June <b>Chief Administrative Officer:</b> Merlyn Bishop from June <b>Chief Building Official:</b> Roger Pigeau until March <b>Chief Building Official:</b> Paul Officer from May <b>Building Inspector:</b> Paul Officer until April <b>Building Inspector:</b> Blayne Roussy from August <b>Library CEO:</b> Barbara Fazekas
2001	Retirement Living and NORDEV	<b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy	George Farkouh	<b>Chief Administrative Officer:</b> Merlyn Bishop <i>(until December)</i> <b>Chief Administrative Officer:</b> Troy Speck <i>(from February)</i> <b>Chief Building Official:</b> Paul Officer <b>Building Inspector:</b> Blayne Roussy
2002	Retirement Living and NORDEV	<b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy	George Farkouh	<b>Fire Chief:</b> Paul Officer <i>(from June)</i> <b>Dep. Fire Chief:</b> Paul Officer from February <i>(to June)</i> <b>Chief Administrative Officer:</b> Troy Speck <b>Chief Building Official:</b> Paul Officer <i>(until February)</i> <b>Chief Building Official:</b> Syl Allard <i>(from September)</i> <b>Building Inspector:</b> Blayne Roussy <b>Library CEO:</b> Barbara Fazekas
2003	Retirement Living and NORDEV	<b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy	George Farkouh	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Troy Speck <b>Chief Building Official:</b> Syl Allard <b>Building Inspector:</b> Blayne Roussy <b>Library CEO:</b> Barbara Fazekas
2004	Retirement Living and NORDEV	<b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy	George Farkouh	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Troy Speck <b>Chief Building Official:</b> Syl Allard <b>Building Inspector:</b> Blayne Roussy <i>(until June)</i> <b>Building Inspector:</b> Chris Clouthier <i>(from September)</i> <b>Library:</b> Patricia Lee <i>(from September)</i> <b>Library CEO:</b> Barbara Fazekas
2005	<i>Pre-August 7:</i> Retirement Living and NORDEV  <i>Post-August 7:</i> Eastwood Mall Inc.	<i>Pre-August 7:</i> <b>Property Manager:</b> Richard Quinn <b>Comptroller:</b> Rhona Guertin <b>General Manager:</b> Richard Kennealy  <i>Post-August 7:</i> <b>President:</b> Robert Nazarian <b>Mall Manager:</b> Marcel Leblanc	George Farkouh	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Troy Speck <b>Chief Building Official:</b> Syl Allard <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Barbara Fazekas
2006	Eastwood Mall Inc.	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Marcel Leblanc <i>(early)</i> <b>Mall Manager:</b> Dan Bouffard <i>(mid)</i> <b>Mall Manager:</b> Tom Turner <i>(late)</i>	George Farkouh	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Tom Derreck <i>(from October)</i> <b>Chief Administrative Officer:</b> Troy Speck <i>(until July)</i> <b>Chief Building Official:</b> Syl Allard <b>Building Inspector:</b> Dale Swan <i>(from December)</i> <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Barbara Fazekas <i>(until August)</i> <b>Library CEO:</b> Suzanne Morin <i>(from July)</i>
2007	Eastwood Mall Inc.	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Tom Turner	Rick Hamilton	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Tom Derreck <i>(until July)</i> <b>Chief Administrative Officer:</b> Fred Bauthus <i>(from September)</i> <b>Chief Building Official:</b> Syl Allard <b>Building Inspector:</b> Dale Swan <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Suzanne Morin

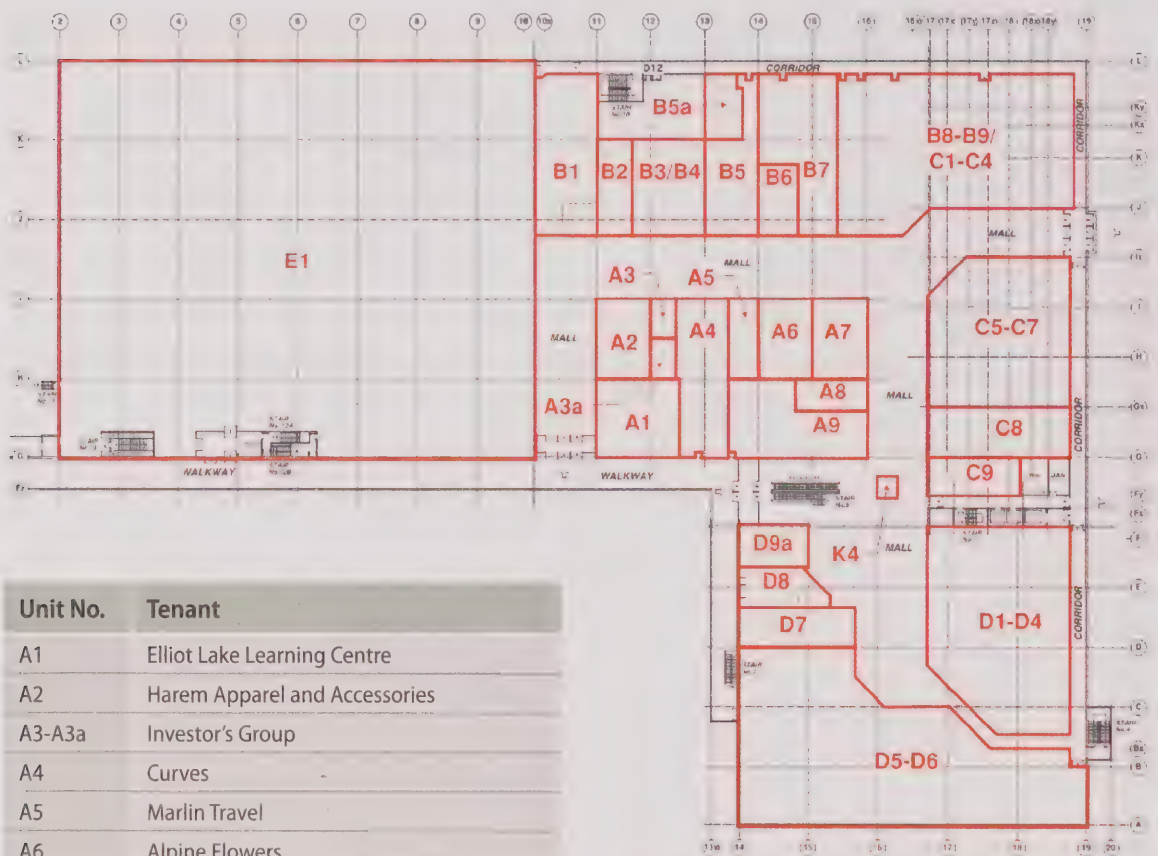
ALGO CENTRE MALL		CITY OF ELLIOT LAKE	
Owner	Employees	Mayor	Employees
2008	Eastwood Mall Inc.	Rick Hamilton	<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Fred Bauthus <b>Chief Building Official:</b> Syl Allard <i>(until May)</i> <b>Chief Building Official:</b> Bruce Ewald <i>(from July)</i> <b>Building Inspector:</b> Dale Swan <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Suzanne Morin
			<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Fred Bauthus <b>Chief Building Official:</b> Bruce Ewald <b>Building Inspector:</b> Dale Swan <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Suzanne Morin <i>(until August)</i> <b>Library CEO:</b> Patricia McGurk <i>(from July)</i>
			<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Fred Bauthus <i>(until June)</i> <b>Chief Administrative Officer:</b> Daniel Gagnon <i>(from June)</i> <b>Chief Building Official:</b> Bruce Ewald <b>Building Inspector:</b> Dale Swan <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee
			<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Daniel Gagnon <i>(until February)</i> <b>Chief Administrative Officer:</b> Rob deBortoli <i>(from March)</i> <b>Chief Building Official:</b> Bruce Ewald <b>Building Inspector:</b> Dale Swan <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Patricia McGurk
			<b>Fire Chief:</b> Paul Officer <b>Chief Administrative Officer:</b> Rob deBortoli <b>Chief Building Official:</b> Bruce Ewald <b>Building Inspector:</b> Dale Swan until May <b>Building Inspector:</b> Chris Clouthier <b>Library:</b> Patricia Lee <b>Library CEO:</b> Patricia McGurk
2009	Eastwood Mall Inc.	Rick Hamilton	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Tom Turner <i>(until February 5)</i> <b>Mall Manager:</b> Brian England <i>(from February 5 to July)</i> <b>Mall Manager:</b> Henri McCleery <i>(from July)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue) (Early)</i> <b>Mall Manager:</b> Ann Sabourin <i>(Mid)</i> <b>Mall Manager:</b> Rhonda Bear <i>(Late)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Rhonda Bear
2010	Eastwood Mall Inc.	Rick Hamilton	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue) (Early)</i> <b>Mall Manager:</b> Ann Sabourin <i>(Mid)</i> <b>Mall Manager:</b> Rhonda Bear <i>(Late)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Rhonda Bear
2011	Eastwood Mall Inc.	Rick Hamilton	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue) (Early)</i> <b>Mall Manager:</b> Ann Sabourin <i>(Mid)</i> <b>Mall Manager:</b> Rhonda Bear <i>(Late)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Rhonda Bear
2012	Eastwood Mall Inc.	Rick Hamilton	<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Henri McCleery <i>(Laroue) (Early)</i> <b>Mall Manager:</b> Ann Sabourin <i>(Mid)</i> <b>Mall Manager:</b> Rhonda Bear <i>(Late)</i>
			<b>President:</b> Robert Nazarian <b>Mall Manager:</b> Rhonda Bear



Appendix D – The Mall and its tenants

The following lists the tenants of the Algo Mall at the time of its collapse and where they were located.

Upper Mall Level

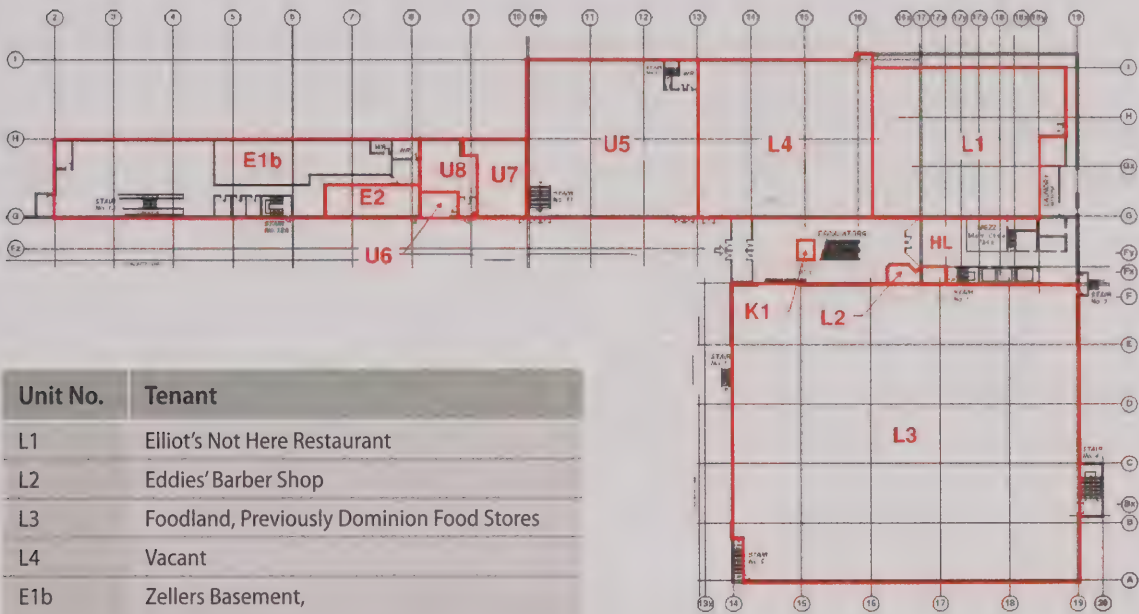


Unit No.	Tenant
A1	Elliot Lake Learning Centre
A2	Harem Apparel and Accessories
A3-A3a	Investor's Group
A4	Curves
A5	Marlin Travel
A6	Alpine Flowers
A7	Lighthouse Cards & Gifts
A8	T-Zone Health
A9	Thompson Jewelers
B1	Vacant, Previously Scotiabank
B2	Vacant
B3/B4	Northern Reflections
B5-B5a	Amost Heaven Day Spa
B6-B7	Vacant
B8-C4	Public Library
C5-C7	Service Canada, Previously Retirement Living
C8	Algoma Health Unit

Source Exhibit 3009

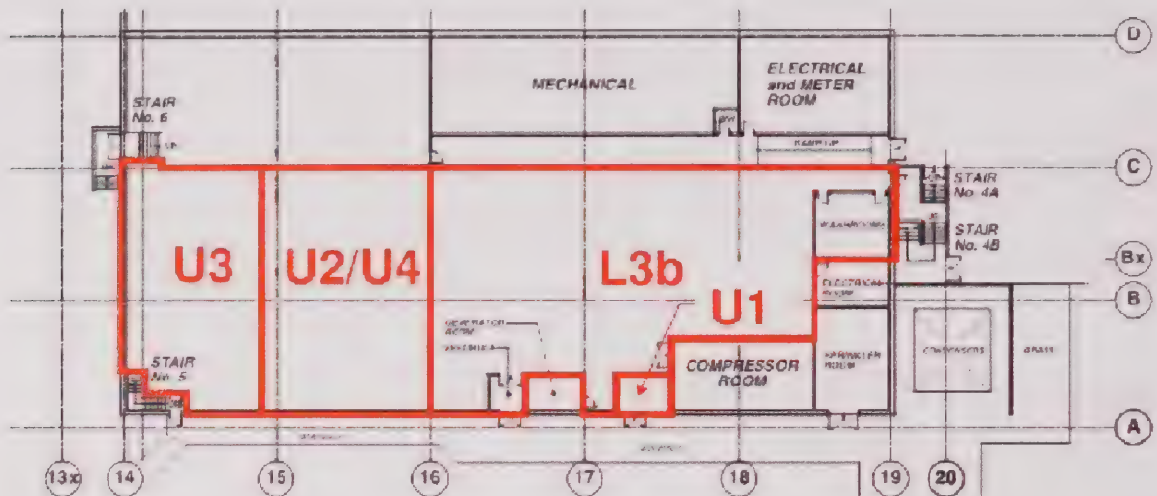
Unit No.	Tenant
C9	Unknown
D1-D4	Dollarama
D5-D6	The Bargain Shop!, Previously SAAN
D7	Mum's Place, Previously Oliver's Grill
D8	Vacant, Previously Tim Horton's
D9a	Hungry Jack's
E1	Zellers, Previously Woolco
K4	Daily Lottery

Lower Mall Level



Unit No.	Tenant
L1	Elliot's Not Here Restaurant
L2	Eddies' Barber Shop
L3	Foodland, Previously Dominion Food Stores
L4	Vacant
E1b	Zellers Basement, Previously Woolco Basement
E2	Reflections Hair Studio
U5	Vacant
U6	Alternative Funeral
U7	Vacant
U8	Vacant
HL	Hotel Lobby
K1	Vacant

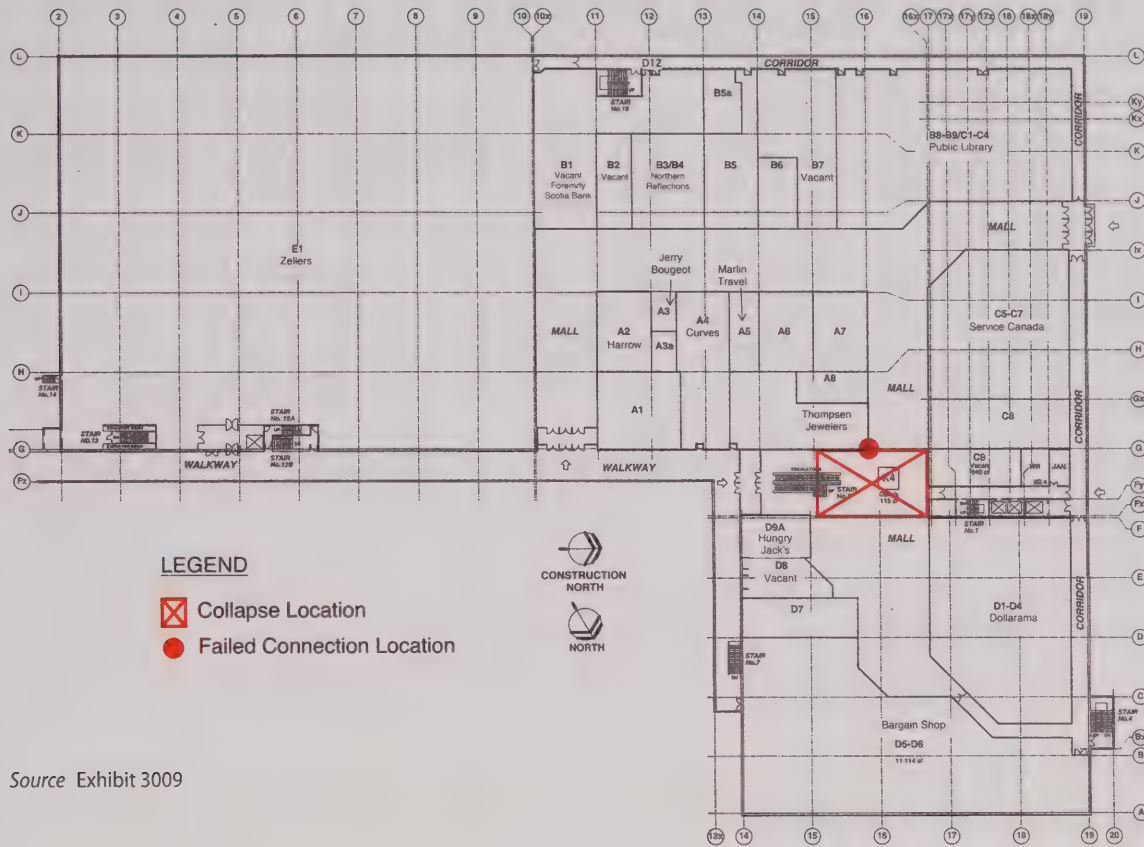
### Pick Up Level



Unit No.	Tenant
L3b	Foodland Basement, Previously Dominion Stores Basement
U1	Union Taxi
U2/U4	Pet Valu
U3	Interior Solutions



## Appendix E – Algo Mall collapse location



Source Exhibit 3009

## Appendix F – Summary of the expert reports referred to in the Commission’s Report

During its 33-year history, the Algo Mall was inspected by a number of consultants. This appendix summarizes those inspections and their findings.

### **May 11, 1979: Report on the review of the proposed waterproofing system prepared by A.E.J. Cunningham for Algocen<sup>1</sup>**

Albert John Cunningham was retained by Algocen to review the waterproofing system proposed by Harry S. Peterson Co. Ltd. (HSP). The report identified the use of hollow core precast concrete slab for the parking deck as a potential problem because slabs are liable to creep. To avoid accumulations of snow that could overload the parking deck, the report recommended that the snow-removal plan for the Mall include the complete removal of snow from the deck level. Mr. Cunningham also recommended that sand, not a sand/salt mix, be used to prevent the formation of ice.

As a precaution against the failure of the Peterson system, the report recommended that the building be overdesigned to accommodate the installation of a 3-inch concrete-wearing slab and membrane in addition to the proposed waterproofing system. Algocen was advised to speak to architects or project engineers on the team who had experience with the proposed system and to ask about the past performance.

### **January 22, 1980: Report on the anchor system prepared by Franklin Trow Associates Ltd. for Algocen<sup>2</sup>**

Franklin Trow Associates Ltd. (FTA) was retained to supervise the installation of the anchor system proposed by York Steel Construction, the steel manufacturer and erector for the project. FTA tensioned the rock anchors after installation.

The report noted that 15 anchors were installed and grouted into the rock behind the Mall. The location of these anchors corresponded to the beams located at gridlines 3 to 17. Once installed, the anchors were tensioned. Trow Group Ltd., Steel Division, confirmed that no detectable movement of the columns had occurred as a result of the tensioning.

### **March 10, 1980: Report on the load test of the hollow core slabs prepared by Trow Group Limited for Algocen<sup>3</sup>**

Trow was asked to perform a load test of the hollow core slabs installed on the lower level of the Mall. The load test demonstrated that the slab was capable of carrying 152 psf.

**August 26, 1981: Report on the Woolco leak investigation prepared by Harry S. Peterson Co. Ltd. for Algocen<sup>4</sup>**

Harry S. Peterson Co. Ltd. (HSP) investigated the leaks that were continuing to occur in the Woolco store. The initial leak problems at the Mall were found to be related to construction details and worker error. Those problems were noted as having been corrected and eliminated. The leaks continued to persist in the Woolco store. HSP carried out ponding tests to isolate the source of these leaks. The tests revealed that water was entering through the area immediately adjacent to the back wall of the Mall. The water then travelled the length of the beam and leaked out at the connection beam approximately 50 feet from the original entry point. The leakage appeared less than 10 minutes after the ponding test began. No other leaks were observed during the test.

When inspectors investigated the leakage area, they found cracks in the foundation wall, along with small failures in both the sealant joint between the deck and the wall and from the buttress to the rock formation adjacent to the building. After repairs were made, the ponding test was repeated, and no further water leaks were observed.

HSP concluded that water had entered the parking deck through the foundation wall or where the foundation wall and the deck met, travelled along the hollow core slab end joint, and dripped down at the end of the beam. The inspectors found that the amount of water travelling this route was surprisingly high, but HSP remained unsure of its exact point of entry.

HSP was confident that any deficiencies in the roof system contributing to the leakage had been corrected. It remained concerned, however, that water could be entering the deck from cracks in certain areas, as identified in the report (the light standard, for example).

**August 1981 (approximate date): Investigation report of leaks in Woolco prepared by Bregman & Hamann, Architects and Engineers, for F.W. Woolworth & Company<sup>5</sup>**

F.W. Woolworth retained Bregman & Hamann to determine the cause of the numerous leaks that were occurring in Woolco. The observed deficiencies included stained ceiling tiles, water in the fluorescent lights, water-logged insulation under the slabs, and water stains on the steel beams. The joints in the poured-in-place concrete topping did not coincide with every joint of the hollow core slabs but at every third joint.

The joints were found to be poorly sealed and finished, and the poured-in-place concrete was not sloped at the perimeter and parapet edge as detailed. There was also water ponding in places.

Bregman & Hamann recommended the application of a waterproofing system and provided three options:

- an elastomeric membrane with a modified epoxy matrix and epoxy finish coat;
- a laminated single-ply plastic core with modified bitumen, and an outer film of polyethylene with protection board and a hot applied asphalt wearing course; or
- a sheet applied waterproof membrane with a hot applied asphalt wearing course.

The sheet applied waterproof membrane with an asphalt wearing course was identified as the most economical and easiest system to install.



### **May 1991: Report on the investigation of the parking structure prepared by Trow Consulting Engineers Ltd. for Algocen<sup>6</sup>**

Trow Consulting Engineers carried out a detailed condition survey of the rooftop parking deck. The inspection and the report focused on the condition of the rooftop parking deck and the underlying steel support structure. Trow did not conduct an inspection of the entire Mall. The inspection was visual, and core samples of the concrete topping and hollow core slabs were also taken to determine the level of chloride contamination of the concrete.

Trow found evidence of deterioration of the underside of the roof slabs and pedestrian walkways. Cracks, spalls, debonding of the concrete, wet spots, exposed reinforcing bars, leaching, scaling, and rust stains were also observed in the roof slabs.

Although Trow observed deterioration and areas requiring repair, its general conclusion was that the components (hollow core concrete slabs, concrete topping, and structural steel beams) of the rooftop parking were generally in good condition. However, its report noted a number of signs of deterioration, including

- impending spalls, owing to the movement of the slabs;
- some evidence of surface rust on the supporting steel beams;
- the expansion joint running east-west was caulked its full length, and all three expansion joints showed signs of leakage;
- the exposed steel of the walkway stairwell and the underside of the slabs were rusted; and
- there were localized areas of broken concrete on the underside of some of the precast panels.

The report noted that the chloride content in the slabs was high. The top surface of the concrete topping had large areas of surface scaling, with evidence of previous repair patches, many of which had debonded. The concrete topping was in an initial state of deterioration, and the sealant applied to the control joints in the concrete topping had debonded from the concrete and was leaking.

The report warned that the high chloride content in the concrete, together with the effect of the freeze/thaw cycle, would cause further deterioration. In addition, the water and salt penetrating through the cracks of the hollow core slabs would cause deterioration of the concrete, pre-stressed cables, ceiling tiles, and sprayed on-fireproofing on the steel beams.

Trow ultimately concluded that the design of the parking deck was inappropriate in achieving a watertight roof. The report proposed two repair options:

- option 1: installation of a waterproofing membrane and wearing course over the top of the existing concrete topping (after repairs to the debonded areas of concrete);
- option 2: removal of the concrete topping and installation of a waterproofing membrane with an asphalt wearing course.

The report recommended option 2 as the better choice. Trow noted that the repairs should be carried out as soon as possible in order to maintain the structural integrity of the slabs and to reduce the potential for further deterioration.

Included as an appendix to the report was a copy of the rooftop parking deck plan identifying the location of all the deficiencies that had been noted on the hollow core slabs, including areas of leakage, spalled concrete, and rust stains.

**July 11, 1991: Clarification on the findings and conclusions provided in the May 1991 report prepared by Trow Consulting Engineers Ltd. for Algocen<sup>7</sup>**

Trow was asked to provide further clarification on the findings and conclusions included in its May 1991 report. It advised Algocen that a good bond was required between the concrete topping and the top of the hollow core precast slabs.

In addition, Trow stated that proceeding with the replacement of the debonded topping only, without any further repairs, was but a partial repair. Caulking the joints and sealing the concrete was not sufficient, and, to stop the leaks, the application of waterproofing over the entire concrete topping was required. Trow again advised that proceeding with option 2, as set out in the May 1991 report, would provide the best protection to the hollow core slabs from the ingress of chlorides and water.

**June 29, 1992: Report on the load capacity of the slabs from Coreslab (Shahid Shaikh) to Algocen<sup>8</sup>**

Coreslab advised Algocen that the 3-inch bonded concrete topping was required in order for the hollow core slabs to safely support the superimposed live load of 75 pounds per square foot (psf) and the superimposed dead load of 45 psf.

**November 9, 1994: Update investigation of the parking structure prepared by Trow Consulting Engineers Ltd. for Algocen<sup>9</sup>**

Algocen retained Trow to perform an updated survey of the condition of the rooftop parking deck. The survey, which included a visual inspection and the taking and testing of core samples of the concrete to determine the level of chloride contamination, compared the results from 1991 to those obtained in 1994.

The report noted numerous water stains on the ceiling tiles, together with rust on the tracks for the ceiling tile. The top and bottom flanges of the steel beams were rusted in the areas of leakage, and portions of the fireproofing on the bottom flanges were missing as a result of water damage. The top surface of the concrete topping was found to be in good condition; however, the cores taken on the rooftop parking showed only a fair to poor bond between the concrete topping and the top of the hollow core slab, or no bond at all. In addition, the chloride content in a number of the cores taken in 1994 was higher than it had been in 1991. Trow advised Algocen that the increased chloride content would cause further deterioration of the concrete topping and that the chlorides had begun to contaminate the hollow core slabs.

The report also included an updated plan of the rooftop parking deck, similar to the one that had been an appendix to the 1991 report. This updated plan showed, for purposes of comparison, the deficiencies identified in 1991 and the new observations made in 1994. In areas where some of the worst leakage had been noted, the steel beams were deemed to be structurally sound but showed evidence of surface corrosion.

The report noted that it was unclear whether the bonded concrete topping was required to achieve the specified load capacity for the slabs. It recommended that a structural review and analysis be undertaken to determine this issue as soon as possible. Trow advised Algocen that, with time, the amount of concrete topping debonding from the top of the hollow core slabs would likely increase. The debonded concrete would then become a structural concern.

### **October 6, 1995: Structural analysis of the hollow core slabs prepared by Alex Tobias Associates Limited for Trow Consulting Engineers Ltd.<sup>10</sup>**

Trow retained Alex Tobias Associates to perform the structural review and analysis recommended in 1994. Its findings and conclusions were included as an appendix to the 1995 Trow report delivered to Algocen. ATA based the structural review on the architectural and structural drawings prepared for the construction of the Algo Mall, together with the Coreslab shop drawings, the previous Trow reports, and the Coreslab load tables. The findings, conclusions, and recommendations were premised on the assumptions that the roof structure had been built in accordance with the drawings, the steel and concrete were structurally sound, and any deficiencies would be repaired properly.

The review determined that the concrete topping needed to be fully bonded to the slabs in order to achieve the required superimposed load for the rooftop parking. ATA concluded that the roof, with a fully bonded topping, could safely support the basic snow and rain load of 53 psf or the vehicle load of 50 psf, leaving 20 psf available for the installation of a waterproof membrane over the properly bonded concrete topping. This conclusion was based on the premise that while the building was occupied and in use, the rooftop parking deck would never have both the full snow load and the full vehicle load at the same time.

The review identified the slabs adjacent to the Hotel as being potentially overstressed because of snow accumulation. The original design required that those slabs have a superimposed load of 130 psf; however, as installed, they had a capacity of only 120 psf. The review recommended that a roof canopy be installed over those areas to prevent snow accumulation and avoid overstressing those slabs.

### **November 6, 1995: Structural analysis of the parking deck prepared by Trow Consulting Engineers Ltd. for Algocen<sup>11</sup>**

The purpose of the report was to determine whether the bonded concrete topping was required and to determine the type of waterproofing system that could be used. The findings and conclusions made by Alex Tobias Associates Limited were included in the body of the Trow report.

The report noted that the areas of debonded topping needed to be repaired as soon as possible in order to maintain the structural integrity of the hollow core slabs. Algocen was warned that if the repairs to the debonded topping were not carried out, the slabs would not be able to carry the dead load of the topping safely. The report also warned that the continued leakage through the joints would lead to chloride contamination and corrosion of the pre-stressing cables embedded in the slabs and the supporting steel beams and, because of the freeze/thaw cycle, to further deterioration of the slabs.

To quantify the repairs required and prepare specifications for the repairs to the rooftop parking deck, the report advised that the structure needed to be inspected again in the spring of 1996 to determine the extent of the debonded concrete. Once the rooftop parking had been repaired and waterproofed, it recommended that monthly visual inspections of the parking deck be made and that any leaks or defects in the system be recorded in a maintenance log. In addition, it recommended that an engineering company make an annual inspection of the rooftop parking deck.

The report identified two repair options:

- option 1: remove and replace the debonded concrete topping and install a waterproofing membrane over the entire deck; or
- option 2: repair the debonded areas of concrete topping on the roof deck and caulk and seal the joints in the parking deck.



Trow recommended that Algocen proceed with option 1: not only would it be more cost effective but it would assure the complete repair of the rooftop parking deck and minimize long-term maintenance costs. Finally, Trow advised Algocen that some increase in deterioration should be expected.

### **October 1, 1996: Review of the precast concrete slabs at gridline 10–10x prepared by P. Meyer Engineering for Algocen<sup>12</sup>**

Algocen asked Paul Meyer to investigate the gap in the expansion joint at gridline 10–10x which previous reports had noted was significantly less than the 2 inches specified in the structural drawings. As the temperature increased, the gap had been observed to close completely over a significant portion of the expansion joint, resulting in damage to the ends of the precast concrete slabs and to the concrete topping along the joint.

After the expansion joint was examined, Coreslab was contacted to obtain directions for the repair and reinstatement of the required 2-inch gap.

The report indicated that the repairs were made in accordance with the directions from Shahid Shaikh of Coreslab. It went on to speculate that the closing of the expansion joint was a possible sign that the building had moved slightly. Ongoing movement of the building had not been noted, however, and the report did not believe that further movement was likely. In the event that there had been movement, the report continued, it had not affected the safety of the building.

### **October 28, 1996: Structural design and construction review report prepared by P. Meyer Engineering for Algocen<sup>13</sup>**

Algocen retained Paul Meyer to review the design and construction of the Algo Mall. The review was based on the structural and architectural drawings as well as the Coreslab shop drawings. He concluded that the structural steel framing was generally acceptable and in conformance with the requirements of the Ontario Building Code. The hollow core slabs were also determined to be in conformance with the Code and correctly installed.

Mr. Meyer also noted that the live load of 75 psf used in the construction of the rooftop parking deck was significantly conservative. Although the maximum accumulation of snow could theoretically develop on the roof (in the absence of any snow plowing), that result would be unlikely while the building was occupied. It was therefore not necessary to account for both the maximum snow accumulation and the maximum car loads for the rooftop parking deck.

In addition, Mr. Meyer concluded that the fully bonded topping was required before the slabs could properly support the specified 120 psf. However, the slabs could support a live load of 50 psf and a dead load of 45 psf (95 psf superimposed load) without the bonded concrete topping. Mr. Meyer interpreted this information to mean that the concrete topping could be removed to allow for the installation of a conventional parking deck waterproofing system.

The report concluded that the foundations, structural steel, and hollow core slabs were capable of supporting the loads to which they would be subjected. The access of large (heavy) vehicles to the parking deck should be eliminated because it posed a serious risk to the structural system. The report advised Algocen to install permanent barriers at the access ramps to prevent large vehicles from accessing the rooftop parking.

### **November 12, 1998: Building condition assessment prepared by Nicholls Yallowega Bélanger for Elliot Lake Retirement Living<sup>14</sup>**

Retirement Living retained Nicholls Yallowega Bélanger (NYB) to prepare a Building Condition Assessment Study of the Algo Centre, including both the Hotel and the Mall. NYB retained Halsall Associates Limited to carry out the structural review portion of the assessment.

In addition to the structural review, NYB (and other consultants it retained as subcontractors) reviewed the interior finishes and upgrading opportunities, the elevators, fire safety, hazardous materials, energy efficiency, and the mechanical and electrical systems. The report set out budgets both for the cost to repair the deficiencies and to perform various upgrades and alterations that Retirement Living was considering in the event that it did decide to purchase the building. The building condition assessment was conducted as a visual inspection only.

The NYB report incorporated, by reference, the findings and conclusions of the November 1998 Halsall report as well as an estimate for the two waterproofing options presented in the Halsall report. NYB concluded that the building was generally in good condition, but that a number of existing building services and systems were reaching, or were extended beyond, their expected normal serviceability. It noted that the repair-cost estimates for the rooftop parking deck did not include any remedial work to the hollow core slabs, and it indicated that it was not in a position to provide an evaluation of the condition of these slabs. NYB raised the possibility that the existing structure was not adequate for the extent of the proposed work.

### **November 11, 1998: Halsall Associates Report to Nicholls Yallowega Bélanger on the structural review of the condition of the Mall<sup>15</sup>**

Nicholls Yallowega Bélanger retained Halsall to perform the structural review for the November 1998 building-condition assessment prepared for Retirement Living. The Halsall report was included as an appendix to the NYB report. The report noted various areas of repairs on the rooftop parking deck as well as corrosion of the structural steel beams and columns. Halsall was not able to provide an opinion on the state of the deck or the projected costs to maintain and/or repair the deck, so it recommended that further studies be carried out.

In light of the conditions noted at the Mall, the report concluded that, considering the age of the structure, it was reasonable to expect that the slabs could deteriorate further, either immediately or in the near future. Because of the significant amount of unknown information, it recommended further studies, including:

- determining the extent of chloride contamination in the hollow core slabs;
- inspecting the pre-stressing strands in the hollow core slabs;
- inspecting the condition of the structural steel beam lateral restraint connections to the hollow core slabs; and
- inspecting the condition of the beam and bracing connections.

The report provided two repair options: the application of a full membrane over the concrete topping, together with an asphalt wearing course; or the removal of the concrete topping and the insulation believed to be sandwiched between the topping and the top of the hollow core slabs, applying a full waterproofing membrane and reapplying a concrete topping. The selection of the repair option, it advised, should depend on the results of the further studies.

**May 10, 1999: Structural condition assessment prepared by Halsall Associates for Nicholls Yallowega Bélanger<sup>16</sup>**

Halsall Associates carried out the further studies outlined in its initial report of November 1998. The inspection included some destructive testing, such as taking core samples of the concrete topping and hollow core slabs as well as the removal of some of the ceiling tiles.

The report set out two repair options for the rooftop parking: option 1 involved routing and sealing all the joints and cracks in the parking deck; option 2 proposed the application of a membrane with an asphalt wearing course. Option 1 was recommended as the preferred repair method. The report noted that option 2 would require diligent snow removal to avoid increasing the load on the roof, or, alternatively, strengthening the deck at a significant cost and also disruption to the tenants and the public.

The inspection found that the concrete topping on the parking deck was generally well bonded to the hollow core slabs, with only a few areas of localized debonding. It also noticed some deterioration of the hollow core slabs, including cracking of the top flange and webs between the cores in the slabs.

The report noted that corrosion had occurred in leakage locations. The corrosion was measured to be approximately 3 millimetres thick, which translated into less than 1 millimetre of section loss. The report included numerous photographs with comments on the deficiencies depicted in them.

**May 18, 2005: Post-remediation verification assessment prepared by M.R. Wright and Associates Co. Ltd. for Chemnorth Systems and Services Co. Ltd.<sup>17</sup>**

After a water infiltration event, Chemnorth Systems and Services Co. Ltd. (Chemnorth) was retained by the Elliot Lake Public Library to test for mould and to perform any remediation required by the test results. Once the remediation was completed, Chemnorth retained M.R. Wright and Associates to carry out a post-remediation verification assessment to confirm that the mould had been completely eradicated.

The report noted that, during the Library's entire 16-year tenancy at the Mall, roof leaks had been problematic.

The inspection conducted by M.R. Wright was visual. The report concluded that, although the mould contamination had been properly remediated, the roof leaks should be resolved to limit the potential for mould growth.

**July 6, 2005: Building condition survey report prepared by Construction Control Inc. for the RBC CMBS Group<sup>18</sup>**

Before Eastwood Mall Inc. purchased the Mall, the Royal Bank of Canada (RBC) retained Construction Control Inc. to inspect the Mall and prepare a report on its condition. The inspection was visual, with no destructive testing or removal of any finishes.

The report noted that the underside of the concrete slabs forming the walkways was in good condition, but the caulking in the joints between the hollow core slabs had deteriorated in many locations, with evidence of water leakage. The water penetration between the joints of the slabs was causing deterioration of the steel framing members of the exterior walkways. The report recommended that repairs should be made to the caulking material sealing the joints.

In addition, the report identified numerous deficiencies in the rooftop parking deck – evidence of numerous previous repairs, deterioration of the concrete, debonded sealant material in the joints, and shrinkage cracks. It outlined the repair work that was being performed at the time to the concrete topping, such as routing and



sealing of the cracks as they appeared in the topping, and recommended that this work continue. The report noted that there was no evidence of water leakage in the building.

In summary, the report found the Mall to be generally in fair to good condition. It noted, however, that the hollow core slabs installed at the walkways had deteriorated in the area of the joints and that water leakage appeared to be occurring at the locations of deterioration. This deterioration was likely occurring, it stated, because of the freeze/thaw cycle and the corrosion of the reinforcing steel in the slabs. The top flanges of the steel beams supporting the underside of the suspended walkways were corroded, probably as a result of water entering between the joints in the slabs.

The report recommended that repairs to the corroded areas of steel framing at the underside of the suspended walkways and the deteriorated concrete on the underside of the walkways be carried out under the direction of a professional engineer. It also included photographs of the various areas that had been inspected.

### **November 2006: Preliminary mould investigation and assessment prepared by M.R. Wright and Associates Co. Ltd. for Chemnorth Systems and Services Co. Ltd.<sup>19</sup>**

Chemnorth retained M.R. Wright to conduct a mould investigation and assessment of the Library following a water infiltration event that occurred on October 13, 2006. The report noted that water had entered from the rooftop parking deck located above the Library. The water had affected the fireproofing materials and the structural steel components, as well as other finishes and components in the Library. M.R. Wright reported that numerous leaks had occurred in the Library over several years.

The inspection was visual, and air samples and tape-lift samples were taken from the Library. The result from the various mould and air-quality tests showed that there was no significant mould growth and that all levels were within acceptable limits.

An inspection of the ceiling cavity revealed significant evidence of water damage to the insulation and fireproofing materials in the Library. The presence of rust on the structural steel components indicated that water problems and/or excessive moisture problems had existed for a period of time.

The report recommended that, to limit the potential for future mould proliferation, all water leaks from the rooftop parking deck should be addressed immediately.

### **November 2006: Preliminary mould investigation and assessment prepared by M.R. Wright and Associates Co. Ltd. for Northern Reflections<sup>20</sup>**

Following several instances of water infiltration, M.R. Wright was retained by the insurer of Northern Reflections to conduct a mould investigation and assessment. The report noted that water had been entering the premises for 13 months through leaks in the rooftop parking deck located above the store.

The various mould and air-quality tests showed that, with the exception of one area that had moderate growth, there was no significant mould growth in the store. The inspection of the ceiling cavity revealed significant water stains and evidence of water damage to the insulation and fireproofing materials. Rust was also noted on the structural steel components, indicating that water problems and/or excessive moisture problems had existed for a period of time.

The report recommended that, in the area with moderate mould growth, remediation work should be done. In addition, to limit the potential for future mould proliferation, the water leaks from the rooftop parking deck should be immediately addressed.

**March 13, 2008: Review of construction drawings and reports to assess potential loading for a roof prepared by John Clinckett Architect to Eastwood Mall Inc.<sup>21</sup>**

John Clinckett reviewed the original structural and architectural drawings for the Mall, as well as notes from Coreslab regarding loading and the 1999 Halsall report. He determined that the structure was properly designed and that the slabs for the rooftop parking deck were designed to carry automobile traffic, snow accumulations, and the weight of the concrete topping. He concluded that, by applying a diversity factor, the roof would be able to carry the weight of a waterproofing membrane and an asphalt wearing course.

Mr. Clinckett found that the structure would not be able to carry the weight of a roof over the parking deck without the addition of new columns. A waterproofing membrane would still be required for the rooftop parking deck, even if a roof were installed.

**August 2008: Mould investigation and assessment report prepared by M.R. Wright and Associates Co. Ltd. for the Algo Centre Mall<sup>22</sup>**

The Mall retained M.R. Wright to conduct a mould investigation and assessment in the space occupied by Zellers. The report noted that the investigation was initiated as a result of complaints filed by the tenant over concerns of mould growth in the store. The inspection was a visual inspection and included the collection of air samples.

Even though the results from the air samples showed the presence of mould, they were all at acceptable levels. M.R. Wright recommended that all water intrusion problems should be resolved to limit the potential for mould growth.

**August 21, 2008: Letter from Kleinfeldt Consultants Limited to Brown & Fabris Law Office<sup>23</sup>**

Although this letter was primarily a summary of the services provided by Kleinfeldt to the Yorkdale Group, it expressed the opinion that, in light of its review, the structure had little to no reserve load capacity to support a conventional rubber membrane and asphalt wearing course. The only option available to waterproof the rooftop parking deck would be the application of a lightweight thin membrane system.

**September 12, 2008: Report from Caughill Consulting to Scotiabank Real Estate<sup>24</sup>**

Scotiabank retained Caughill Consulting to investigate the damage caused by water leaks in its branch in the Algo Mall. The report noted that water had entered the space occupied by the bank through the rooftop parking deck located above the tenant space. Overall, water leaks had been a long-standing problem at the Mall. Although repairs to the rooftop parking deck were under way, ongoing leaks indicated that the repairs were inadequate, insufficient, or inappropriate.

The report concluded that although repair work was in progress, it was doubtful that the repairs would be effective. One significant deficiency was the lack of technical supervision and quality control of the repair work. In addition, water had caused corrosion damage to the steel – and this problem needed to be investigated to confirm the structural integrity of the Mall.

It was noted that the landlord should obtain a report prepared by a professional engineer addressing the condition and the detail of all joints and confirming the structural integrity of the steel and concrete of the Mall. The report also included photographs of the various areas that had been inspected.

**December 2008: Mould investigation and assessment report prepared by M.R. Wright and Associates Co. Ltd. for the Algo Centre Mall Public Library<sup>25</sup>**

The Library retained M.R. Wright to conduct a mould investigation assessment to determine whether some of the books had mould. The inspection was visual and included the collection of air samples and a review of the condition of seven books. Although the samples showed the presence of mould, they were all at acceptable levels.

M.R. Wright recommended that all water intrusion problems should be resolved to limit the potential for mould growth.

**June 3, 2009: Structural review report of the tenant space occupied by Retirement Living prepared by M.R. Wright and Associates Co. Ltd. for Eastwood Mall Inc.<sup>26</sup>**

The Retirement Living tenant space was located below the Hotel portion of the building. The inspection found it to be structurally sound, with no visual deficiencies or evidence of water staining.

**June 19, 2009: Preliminary building condition assessment prepared by Pinchin Environmental for Midland Loan Services Inc.<sup>27</sup>**

Midland Loan Services retained Pinchin to carry out a building condition assessment and prepare a report as part of the due diligence process of a prospective purchaser. Pinchin performed only a visual inspection of the Mall. No destructive tests were performed and no finishes were removed during the inspection.

In his report, the author noted that he had been advised that the option of applying a rubberized membrane over the concrete topping and paving the parking deck had been considered. It was dismissed, however, because the hollow core panels did not have sufficient load-carrying capacity to bear the extra weight of the waterproofing membrane and the asphalt wearing course.

The report described the general elements of the Mall and Hotel and identified the areas requiring repairs. It stated that the structural elements of the building had been examined and found to have no observed deficiencies or deteriorations, so it neither recommended nor required any action. Pinchin noted in its report that no deficiencies were seen which would compromise the integrity of the structure.

The report noted evidence of water infiltration on the interior finishes, in particular water-stained ceiling tiles. It recommended that the source of the water penetration be eliminated and the damaged ceiling tiles replaced.

Section 3.8 of the report addressed the condition of the rooftop parking deck. It noted that the repaired expansion joints were in good condition, with one exception: the joint located in the northwest portion of the parking deck had been damaged during snow removal.

At the time of the inspection, routing and sealing the control joints of the concrete topping was in progress. The report noted no major deficiencies in the rooftop parking deck, though it identified the damaged expansion joint in the northwest portion as a minor deficiency and recommended repairs. It concluded that the rooftop parking deck was performing in a satisfactory condition, with minor water infiltration.



The report recommended two options to address the water infiltration problem: first, the removal of the concrete topping, followed by the application of a waterproofing membrane and replacement of the concrete; second, monitoring the concrete topping for new cracks and damage to the expansion and control joints and, to minimize water infiltration, carrying out repairs to the concrete topping in a timely manner. Pinchin was not able to determine the condition of the hollow core slabs of the parking deck because the scope of work did not include destructive testing. It recommended that the condition of these slabs of the parking deck be evaluated for concrete delamination resulting from water and salt infiltration through the concrete topping. The report also included photographs of the various areas inspected.

**October 28, 2009: Structural review report prepared by  
M.R. Wright and Associates Co. Ltd. for Eastwood Mall Inc.<sup>28</sup>**

Eastwood Mall retained M.R. Wright and Associates to conduct an inspection of the Mall in accordance with the requirements set out in the Order to Remedy Violation of Standards of Maintenance and Occupancy issued by the City of Elliot Lake on September 25, 2009. Although the report delivered following the inspection was noted as a draft report, no other version was delivered.

The inspection was a visual inspection with no destructive testing or removal of any of the interior finishes. The original architectural and engineering drawings for the construction of the Mall were also reviewed. While Robert Wood was inspecting the Mall, caulking and waterproofing repairs were being carried out on the roof.

The report noted that it was evident that leaks had occurred over the years:

- Several leaks in the Zellers store had led to the installation of leakage collections systems in the ceiling to capture the water entering through the roof deck.
- Water leaks in the perimeter corridor at the location of the steel-beam supports had caused the fireproofing on the steel beams to fall away from the bottom flange. The steel was rusted on the top of the bottom flange, but the rust did not present any structural loss of capacity.
- The steel beam along gridline 16 above the lottery kiosk had minor surface rust where the fireproofing had fallen away because of water saturation. No deterioration of the hollow core slabs was observed.
- The fireproofing on the steel beams of the Bargain Shop was missing on the bottom flange, but no loss of section was observed.

The main concern identified was the missing fireproofing, which had fallen away because of the entry of water through the rooftop parking deck. The report recommended that the missing fireproofing be replaced. It also included photographs of the various areas inspected.

**April 30, 2012: Parking deck waterproofing repairs report prepared by  
M.R. Wright and Associates Co. Ltd. for Eastwood Mall<sup>29</sup>**

The report noted no structural concerns over the additional loading of the caulking being applied on the roof top parking deck. It was more concerned that the repairs to the rooftop parking deck might not be completed.

**May 3, 2012: Structural condition inspection prepared by M.R. Wright and Associates Co. Ltd. for Eastwood Mall<sup>30</sup>**

Eastwood Mall retained M.R. Wright and Associates to inspect the Mall and provide a report on its structural condition. It was a visual inspection only: no destructive testing was performed and no interior finishes were removed to facilitate the inspections.

The report noted rust on the structural steel members in areas where water infiltration had occurred through the rooftop parking deck. The corroded beams had little loss of section and were still structurally sound. The report concluded that the rusting had not detrimentally changed the load-carrying capacity of the structure. Nor were there any visual signs of distress.

The report also included photographs of the various areas inspected, including a photograph of the water-collection system in Zellers and a photograph of a heavily oxidized bottom flange of a beam in that same store.

Later, the report was amended at the request of the Mall owners by removing the words “ongoing leakage” and “of particular concern.” In addition, the photographs showing the water-collection system in Zellers and the heavily oxidized bottom flange of the beam there were removed from the report.

**Notes**

<sup>1</sup> Exhibit 15.	<sup>8</sup> Exhibit 41.	<sup>17</sup> Exhibit 11-106.	<sup>26</sup> Exhibit 11-188.
<sup>2</sup> Exhibit 25.	<sup>9</sup> Exhibit 44.	<sup>18</sup> Exhibit 88.	<sup>27</sup> Exhibit 751.
<sup>3</sup> Exhibit 26.	<sup>10</sup> Exhibit 49.	<sup>19</sup> Exhibit 325.	<sup>28</sup> Exhibit 103.
<sup>4</sup> Exhibit 27.	<sup>11</sup> Exhibit 51.	<sup>20</sup> Exhibit 10-91.	<sup>29</sup> Exhibit 139.
<sup>5</sup> Exhibit 6227.	<sup>12</sup> Exhibit 63.	<sup>21</sup> Exhibit 92.	<sup>30</sup> Exhibits 110, 111,
<sup>6</sup> Exhibit 35.	<sup>13</sup> Exhibit 65.	<sup>22</sup> Exhibit 12-120.	116, 117.
<sup>7</sup> Exhibit 37.	<sup>14</sup> Exhibit 66.	<sup>23</sup> Exhibit 97.	
	<sup>15</sup> Exhibit 742.	<sup>24</sup> Exhibit 13-117.	
	<sup>16</sup> Exhibit 72.	<sup>25</sup> Exhibit 319.	

## Appendix G – Policy roundtables – Part One

To assist in formulating my recommendations, I convened a series of policy roundtables after the completion of the evidence and closing submissions. Each roundtable, chaired by a Commission counsel, consisted of a number of experts from those sectors that could be affected by my possible recommendations. The roundtables considered a series of questions prepared by Commission staff. These questions were also designed to reflect the recommendations made by participants in their closing submissions. Listed below are the dates, moderators, roundtable participants, and topics, followed by biographies of the participants.

### ROUNDTABLE 1 – INCREASING PUBLIC SAFETY

MONDAY, NOVEMBER 18, 2013

Moderator: Peter Doody

#### Participants:\*

- Ann Boroah, Chief Building Official, City of Toronto
- Dean Findlay, Ontario Building Officials Association
- Randal Froebelius, Secretary-Treasurer, BOMA Canada, and President of Equity ICI Real Estate Services
- Stuart Huxley, Senior Legal Counsel, City of Ottawa, representing the Association of Ontario Municipalities
- Ministry of Labour – Wayne De L'Orme, Director, Mining Health and Safety Review
- Ministry of Municipal Affairs and Housing – Brenda Lewis, Director, Building and Development Branch
- Michael Ostfield, Toronto Lands Corporation
- Warwick Perrin, Ontario Association of Property Standards Officers
- Peter Sharpe, Former President Cadillac Fairview Corporation Limited



Roundtable 1 participants, sitting, from left: Warwick Perrin, Brenda Lewis, Peter Sharpe; standing, from left: Dean Findlay, Stuart Huxley, Ann Boroah, Michael Ostfield, Wayne De L'Orme, Randal Froebelius (PHOTO: Matt Copeland)

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\* Positions are at time of participation.



**Topics:**

1. Should there be mandatory periodic inspection of all buildings? If so, by whom (province, municipality or building owner)? How often? What kinds of buildings?
2. Should there be mandatory minimum property standards for all buildings? If so, who should establish them (province or municipality?). How should they be enforced?
3. Should those who have responsibility for public safety in buildings (municipalities, MOL, etc.) have the power, or be required, to force owners to retain a professional (engineer or architect) to approve proposed repairs or maintenance to existing buildings? Should a record be kept of all remedial actions undertaken by the owners?
4. Should clear guidelines be established in the regulations governing the Chief Building Official in cases where public safety may be at risk based on the degree and imminence of the threat and the response of the owner, making it clear that in cases where an owner is either unwilling or unable to take steps necessary to avoid risks to human safety (a) an order be promptly issued; (b) a clear period of time be allowed for compliance; (c) at the end of that time, the city must take further enforcement steps to prosecute, to conduct the work at the owner's expense or to close and condemn the structure?
5. Is the training for building officials, in particular, for property standards officers, sufficient? Should there be mandatory training, competency qualifications and certification of property standards officers? What degree of independence should property standards officers have from other municipal officials? Should building officials, including property standards officers, be regulated as a profession?
6. Considering the information you have gleaned from the proceedings of the Elliot Lake Commission of Inquiry, can you provide your top five recommendations as to what should be done to ensure that a similar tragedy does not occur again in Ontario or elsewhere in Canada? If possible, identify the sort of buildings or occupancies which should be the highest priority.

**ROUNDTABLE 2 – IMPROVED SHARING OF REPORTS AND INFORMATION****TUESDAY, NOVEMBER 19, 2013****Moderator: Peter Doody****Participants:**

- Ann Borooah, Chief Building Official, City of Toronto
- J. Lorne Braithwaite, CEO, BUILD TORONTO
- Randal Froebelius, Secretary-Treasurer, BOMA Canada and President of Equity ICI Real Estate Services.
- Stuart Huxley, Senior Legal Counsel, City of Ottawa, representing the Association of Ontario Municipalities
- Ministry of Labour – Vivien Wharton-Szatan, Program Manager for the Industrial Health and Safety Program
- Ministry of Municipal Affairs and Housing – Brenda Lewis, Director, Building and Development Branch
- Alan Shaw, Ontario Building Officials Association
- Ryan Stein, Director of Policy, Insurance Bureau of Canada



Roundtable 2 participants, sitting, from left: Ryan Stein, Brenda Lewis, J. Lorne Braithwaite; standing, from left: Alan Shaw, Stuart Huxley, Ann Borooah, Vivien Wharton-Szatan, Randal Froebelius (PHOTO: Matt Copeland)

## Topics:

1. Should the owner of a building be required to keep a secure record of and provide the information relating to the condition of a building (all private, as well as public, documents and information dealing with the condition of those buildings over their lifetime, including information on the nature and extent of the services provided by an engineer and an architect, the name, identity and contact information of those professionals and any remedial actions taken as a result of inspections)
  - (a) to any purchaser or other person seeking to acquire an interest in the building, financial or otherwise?
  - (b) to any person or agency conducting or supervising any inspection, assessment, repair or renovation of a building before any such inspection, assessment, repair or renovation begins?
  - (c) to the municipality whenever a building permit is required for repairs and renovations?
  - (d) to a provincial agency?
2. Should the owner of a building (and perhaps those who prepared the building information?) be required to register the information (e.g. Reports) relating to the condition of a building on the title to the property?
3. If so, should the availability of this information apply to all buildings or just commercial buildings?
4. If there is no requirement to register the information (e.g. Reports) relating to the condition of a building on title to the property, should the information be made accessible to the public by some other means such as a central registry? Or should they at least be filed with the Chief Building Official?
5. Should the building owner be required to complete an Affidavit as mandatory closing document that states at a minimum the following:

- (a) The owner has disclosed all engineering reports that have been conducted while the building has been owned by the present owner.
  - (b) That the owner has undertaken appropriate inquiry in order to obtain the history of all engineering reports on the property and they are stated here.
  - (c) There are no reports or documents that the owner is aware of with respect to this real property that deal in any way with the structural assessment or condition of this building that have not been disclosed to the purchaser.
6. Should any and all engineers and architects who have provided services to an owner of a building make available all information in their possession to successor engineers or architects requesting such information?
7. Should municipal governments be required to document all oral and written complaints, even if the person wishes to remain anonymous? Should municipal governments be required to keep a public registry of all property standards by-law violations that deal with the safety and soundness of a building structure, including any follow-up action taken by the municipality and remedial action taken by the owner or municipality?
8. The *Occupational Health and Safety Act* (sections 51 and 52) currently provides for certain obligations on employers to provide notice to the Ministry of Labour where a person is critically injured or killed at a workplace or a person is disabled from performing his/her work or requires medical attention because of an accident, explosion, fire at a workplace. Should these notice obligations be expanded to include situation of imminent danger, accident or injury? In addition, should an employer be required to report to the Ministry of Labour any health and safety recommendation made by a joint committee or a health and safety representative which is not followed and may lead to critical injury?
9. Considering the information you have gleaned from the proceedings of the Elliot Lake Commission of Inquiry, can you provide your top five recommendations as to what should be done to ensure that a similar tragedy does not occur again in Ontario or elsewhere in Canada? If possible, identify the sort of buildings or occupancies which should be the highest priority.

### **ROUNDTABLE 3 – ROLE OF PROFESSIONALS AND OTHER BUILDING CONSULTANTS**

**WEDNESDAY, NOVEMBER 20, 2013**

**Moderator: Bruce Carr-Harris**

#### **Participants:**

- Paul Acchione, President, Ontario Society of Professional Engineers
- J. William (Bill) Birdsell, President, Ontario Association of Architects
- Dale Craig, Chairman of J.L. Richards and Associates Limited
- Prof. Jag Humar, Carleton University
- Gregory (Greg) Miller, CET, CBCO, Vice-President on OACETT (Ontario Association of Certified Engineering Technicians and Technologists) Council and Manager, Building and By-law Services and Chief Building Official for the Town of the Blue Mountains
- Chris D. Roney, P. Eng., Professional Engineers of Ontario (PEO)





Roundtable 3 participants, sitting, from left: Chris D. Roney, Jag Humar; standing, from left: J. William Birdsell, Gregory Miller, Paul Acchione, Dale Craig (PHOTO: Matt Copeland)

### Topics:

1. Should the term “prime consultant” be defined and the roles and responsibilities clearly enunciated?
2. Should Consultants, including engineers, architects and building inspection companies, be required to clarify the scope of their expertise to their clients and to clearly establish which elements of the building they are qualified to provide an opinion on and which elements of the building they will not be inspecting or addressing due to lack of sufficient expertise?
3. Should the PEO, the OAA and the OACETT provide guidelines with clearer standards for the inspection of an existing building, including best practices to
  - establish clear terminology to ensure that clients and regulators understand the scope of work, defining the scope of work expected in various types of inspections (for example, opening up concealed areas to examine connections or measuring corrosion) and ensuring that the engineer has sufficient resources, and a sufficient retainer, to be able to complete the required work;
  - clarify which documents should be reviewed prior to the inspection;
  - clarify which questions must be asked of the on-site owner representative, including a request for production of previous structural engineering reports;
  - identify the critical areas and determine the appropriate number of samples on which to draw credible conclusions;
  - document the inspected areas, including photographs, measurements, samples and notes;
  - clarify and define terms such as “visual” inspection, “condition assessment,” “detailed condition assessment,” “structural assessment report,” “structural elements”;
  - prohibit the use of statements in reports such as “All beams inspected had little loss of section and we would consider the members still structurally sound” where the location of those beams or structural elements on which that opinion was based has not been identified within the report;

- establish a baseline of what is deemed to be an appropriate representative sample of the structural system and its components, including joints and connections, and structural steel to be inspected before the professional inspecting the building can confidently confirm that a building is “structurally sound”;
  - set out the minimum standards for inspection by the professional inspecting the building to determine whether there has been “section loss” of structural elements. In particular whether actual measurement is required where corrosion has been identified or that a “visual assessment” of the degree of corrosion is sufficient;
  - define what the professional inspecting the building must include in their reports in relation to which elements of the building have and have not been inspected. Should the Guidelines require that a review of structural steel must include an inspection of and report on the condition of the connections, failing which the structural review is not complete?;
  - specify when the professional conducting the inspection should include a warning in their report to the client of the potential risks of failing to follow the recommendations in the report where significant or potentially unsafe deficiencies in the building have been identified and recommendations have been made for the repairs;
  - set out when it is appropriate to make changes to a draft report based on client feedback;
  - set out when copies of the reports for the buildings which have been inspected in the past should be retained;
  - establish an obligation to create and maintain a searchable database within their respective offices (locally and nationally) which would allow the professional conducting the inspection to search to see if their respective companies have inspected a particular building in the past (for any reason) and to review the previous files and reports prior to taking on a new retainer, or conducting a further inspection of the building; and
  - clarify the procedure to be followed when signing a report prepared by a graduate professional in training, a CET or an unlicensed engineer.
4. Should there be a requirement on engineers and architects to advise clients (past and present?) of the suspension or revocation of their licence?
  5. Although architects and engineers currently have a duty to report a building which poses a threat to the safety and security of the public, should a guideline be issued by the PEO, OAA and/or the OACETT which provides:
    - (a) a standard of when the professional is to report the unsafe conditions (e.g. degree of risk);
    - (b) that public safety should be the primary consideration;
    - (c) to whom the professional is to report the unsafe condition (e.g. professional organization, CBO of the municipality in which the unsafe building is located, owner); and
    - (d) whether the professional (architect, engineer, CET) reporting the unsafe building should be afforded immunity from liability where the building has been reported in good faith.
  - 5a) The Algo Centre Mall included an open air parking lot over occupied space. Are you aware of other commercial buildings in Canada of similar design and construction? Are there problems with this kind of structure which need to be addressed by consultants?

6. Should the concept of a “provincial engineer” be adopted in Ontario?
7. In the past, engineers had specialties that were identified on their seals. Should the PEO, in the case of structural engineering at least, revert to that approach, including specific training and mandatory continuing professional education components for engineers practising and holding themselves out to the public as “structural engineers”?
8. Should Professional Engineers of Ontario adopt a system of mandatory continuing education similar to other professions in the province and like other professional engineering licensing bodies in several other provinces?
9. Should PEO adopt guidelines for structural engineering practice and independent documented structural engineering review similar to those now published by APEGBC and which resulted from the inquiry into the Station Square collapse in Burnaby, B.C., in 1988?
10. What is the general state of knowledge in the engineering profession of corrosion, and particularly what conditions affect the rate of corrosion of structural steel and what is the impact of corrosion on the anticipated life of a building’s structural integrity? Is there continuing education in this area and, if not, should there be?
11. Considering the information you have gleaned from the proceedings of the Elliot Lake Commission of Inquiry, can you provide your top five recommendations as to what should be done to ensure that a similar tragedy does not occur again in Ontario or elsewhere in Canada? If possible, identify the sort of buildings or occupancies which should be the highest priority.

## BIOGRAPHIES\*

**Paul Acchione**, P. Eng., is the 2013–14 president and chair of the Ontario Society of Professional Engineers (OSPE). He began his career at Ontario Hydro, holding various roles from 1971 to 2002, including design engineer, design engineer specialist, supervising design engineer, and department manager. He chaired a number of technical and design reviews conducted as part of the quality assurance program for nuclear power plants. Since 2002, he has worked as management consultant with Market Intelligence and Data Analysis Corporation. He has been an active member of the OSPE Political Action Network since 2006 and participated as a member of OSPE’s *Professional Engineers Act* Task Force. He is a member of four technical societies and has co-authored 12 technical papers related to project engineering and management, simulation analysis, engineering design, and application of digital computers. He holds a master of engineering (mechanical), with honours, from the University of Toronto.

**J. William Birdsell** was elected president of the Ontario Association of Architects (OAA) in January 2013. He was appointed to OAA Council in 2009 and elected the following term. He served as senior vice-president and treasurer in 2011 and 2012 and served on the Human Resources and Governance committees. In 2010, he was the vice-president, practice, and served on the Complaints Committee and the Experience Requirements Committee. Mr. Birdsell is the principal of J. William Birdsell Architect in Guelph, a full-service architectural firm working with institutional and private clients on a wide range of projects, including residential, commercial, industrial and institutional, and adaptive reuse of many existing structures. After receiving his bachelor of environmental studies from the University of Waterloo in 1982, he completed his bachelor of architecture in 1984. He is a member of the Royal Architectural Institute of Canada.

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\* Positions are at time of participation.



**Ann Borooah** has been the chief building official and the executive director of the Toronto Building Department since November 2001. She oversees a staff of more than 400 people responsible for enforcing the *Building Code Act* in Toronto. She has overseen the transition to a new *Building Code Act* and has led key initiatives, including a program review of inspection and enforcement, the implementation of Toronto standards for green roof construction, and a new sign regulation and taxation system for the city. Between 1993 and the time she joined the city, Ms. Borooah was the director of the Development and Buildings Branch of the Ministry of Municipal Affairs.

**J. Lorne Braithwaite** is president and CEO of BUILD TORONTO. He has been an active commercial developer in California, London (England), and Dubai. He was appointed president and CEO of BUILD TORONTO in April 2009, creating value for the City of Toronto through real estate. Before joining BUILD TORONTO, he was founder, chairman, president, and CEO of Cambridge Shopping Centres (now Ivanhoe Cambridge), where he amassed 40 large enclosed malls. Mr. Braithwaite served as the worldwide chairman of the International Council of Shopping Centres from 1995 to 1996. He was president of the Canadian Institute of Public and Private Real Estate Companies from 1995 to 1997. He holds a bachelor of commerce from the University of Alberta and an MBA from the University of Western Ontario.

**Dale Craig** is an associate and chairman of J.L. Richards and Associates Limited and leads the engineering firm's major business development initiatives for P3, Design / Build, Fast Track Construction Management, and Design / Bid / Build projects. He is responsible for the management of key client and partner relations and the organization of project teams, presentations, and contract negotiations. Along with his corporate duties and mentoring role, he maintains direct involvement in the management of complex major assignments for the firm to ensure that client needs and project objectives are met. He has decades of experience managing multidisciplinary teams on projects up to \$310M in value. These projects typically involve all engineering disciplines, architecture, planning, project management, and specialty consultants. In addition to his duties with JLR, Mr. Craig has maintained an active involvement in the community and in the professional industry. Currently, he serves on the board of governors of Carleton University and the board of Hydro Ottawa Holdings Inc. He received his B. Eng. (civil engineering), with distinction, from Carleton University in 1970.

**Wayne De L'Orme** is the director, Mining Health and Safety Review, of the Ontario Ministry of Labour, leading a review of health and safety in Ontario's underground mines. The Review will engage industry stakeholders in a review of the present regulatory framework, the role of the inspectors, and the adequacy of the Ministry of Labour's response to new and emerging issues, and will develop, in consultation with other ministry branches, a plan to enhance health and safety in Ontario mines. He holds a bachelor of science and a bachelor of education from the University of Saskatchewan and an MBA from the University of Western Ontario.

**Dean Findlay** is immediate past president of the Ontario Building Officials Association and president of the Alliance of Canadian Building Officials. He is chief building official / manager – Building Division – of the City of Peterborough and has 19 years' experience as a building official in rural, small urban, and large urban settings.

**Randal Froebelius** is the secretary-treasurer of BOMA (Building Owners and Managers Association) Canada. He is also president and founder of Equity ICI Real Estate Services. He has more than 17 years' experience in the management, development, and construction of industrial, commercial office, retail, institutional, and residential properties. He has held project management positions at Ellis-Don and PCL Construction and progressively senior management positions at Bramalea Ltd. and Beutel Goodman Real Estate Group. Before founding Equity ICI, he was responsible for all property management and construction activities associated with the Kolter Property Company's six million-square-foot portfolio of assets in Toronto and Dallas. He holds a bachelor of engineering science from the University of Western Ontario and an MBA from the Richard Ivey School of Business. He is a licensed professional engineer in the Province of Ontario.

**Jag Mohan Humar**, P. Eng., is Distinguished Research Professor of Civil Engineering at Carleton University. Between 1990 and 2000, he was chair of the Department of Civil and Environmental Engineering and was a professor in the department from 1975 to 2003. He was superintending engineer, executive engineer, and assistant executive engineer in the Central Public Works Department in India between 1960 and 1975. He received a bachelor of science (civil engineering) from Banaras Hindu University, India, in 1958; a master of technology from the Indian Institute of Technology, Kharagpur, India, in 1959; and a PhD from Carleton University in 1974. He has been a member of the Standing Committee on Earthquake Design, an advisory body to the *National Building Code of Canada*, since 1995; and a member of the editorial board of the international journal *Earthquake Engineering and Structural Dynamics* since 2008. He has been a consultant to Public Works and Government Services Canada on various projects, including the development of design and analysis software; vibration studies of the Alexandra Bridge; dynamic vehicle crash studies; and blast-induced vibration studies for the Parliamentary Precinct in Ottawa. He is a Fellow of the Canadian Society of Civil Engineering, the Engineering Institute of Canada and the Canadian Academy of Engineering.

**Stuart Huxley** is senior legal counsel with the City of Ottawa. He was called to the Ontario bar in 2000, and has worked exclusively as counsel to the City of Ottawa since 1998. He leads the city's Prosecution Unit and has extensive prosecution experience with regulatory matters, including the *Building Code*, the *Fire Code*, and the *Planning Act*, as well as various municipal by-laws before the Ontario Court of Justice. Mr. Huxley also practises municipal law and litigation before the Superior Court of Justice and has represented the city on significant matters before coroner's inquests, Divisional Court, the Court of Appeal for Ontario, and the Supreme Court of Canada.

**Brenda Lewis** is director of the Building and Development Branch of the Ontario Ministry of Municipal Affairs and Housing. She is responsible for the building regulatory environment in Ontario.

**Gregory (Greg) Miller** is vice-president of the Institute of Engineering Technology of Ontario (IETO) and has served on the Ontario Association of Certified Engineering Technicians and Technologists (OACETT) council since 2007. He has volunteered for 15 years in various roles for OACETT, including as Georgian Bay chapter chair, college liaison, and regional secretary-treasurer for the Central Region. He is currently the manager, Building and By-law Services, and the chief building official for the Town of the Blue Mountains, and he oversees the day-to-day operations of the town's Ontario *Building Code* program, by-law enforcement, and security alarm registrations. Mr. Miller currently chairs the OACETT Government Relations Committee and has represented OACETT on several provincial government committees to review *Building Code* qualifications and currency of maintenance requirements. He is qualified for all 11 categories of qualifications under the Ontario *Building Code* and is a certified building code official and certified engineering technologist.

**Michael Ostfield** is counsel to the Toronto Lands Corporation, a wholly owned subsidiary of the Toronto District School Board. Toronto Lands manages surplus school properties on behalf of the board. Mr. Ostfield has more than 30 years' experience in the development and management of commercial real estate, both as a lawyer and, for several years, general manager of development for Eaton's. He was also in-house counsel with Famous Players, the Bank of Nova Scotia Real Estate Group, and Pet Valu Inc. His previous experience includes the management and operation of several major shopping centres across Canada.

**Warwick Perrin** is president of the Ontario Association of Property Standards Officers, a volunteer professional organization promoting the interests of by-law enforcement officers. He has served eight years as chair of the Certification Training Committee and been an instructor in the certification training program since 1992. He is currently employed as an acting supervisor in the Investigation Services Unit of the Municipal Licensing and Standards Division of the City of Toronto. He has 23 years of municipal law enforcement experience, with approximately 11 years focusing on multiple residential properties.



**Chris D. Roney**, P. Eng., holds an honours degree in civil engineering from Queen's University. A third-generation engineer, he heads Roney Engineering Limited, a Kingston, Ontario, consulting firm offering a full range of structural engineering services related to building design and construction, investigations, and restorations. Mr. Roney is a practising structural engineer and is accredited as a building design specialist and consulting engineer. He is a member of the Ministry of Municipal Affairs and Housing's Building Advisory Council, which provides strategic advice to the minister on matters related to ongoing policy, administrative, and technical issues concerning the *Building Code Act* and the *Building Code*. He currently serves on the Council of Professional Engineers of Ontario (PEO) and has held a number of positions on it for more than 10 years. He now serves on the Complaints Committee and the Engineers, Architects and Building Officials Committee to deal with issues of mutual concern and interest among PEO, the Ontario Association of Architects, and the Ontario Building Officials Association. Mr. Roney is a director on the board of Engineers Canada, the national organization of the provincial and territorial associations that regulate the profession of engineering in Canada and license the country's more than 260,000 members.

**Peter Sharpe** retired in 2010 after 11 years as president and CEO of Cadillac Fairview Corporation Limited, one of North America's largest investors, owners, and managers of commercial real estate. Mr. Sharpe joined Cadillac Fairview in 1984 as vice-president of property management in charge of the Canadian office portfolio and assumed responsibility for retail properties in 1988. He was promoted to executive vice-president, property operations, in 1996, and became president and CEO in March 2000, when the Ontario Teachers' Pension Plan purchased 100 percent of the company. Mr. Sharpe has also served as the global chairman of the International Council of Shopping Centers, the world's largest real estate association. He graduated in 1970 from Wilfrid Laurier University (at that time called Waterloo Lutheran University) with an honours degree in business administration and economics.

**Alan Shaw** has been manager of Building and By-law Enforcement of the City of Sarnia since 2008, fulfilling the role of chief building official. Before that, he was chief building official for the Municipality of Central Elgin and the Municipality of Sioux Lookout. He earned his diploma in architectural technology from Sheridan College in 1992. He has been regional director and vice-president of the Ontario Building Officials Association since 2007.

**Ryan Stein** is the director of policy at the Insurance Bureau of Canada, the national industry association representing Canada's private home, car, and business insurers. He works with insurance companies to develop solutions to the various legislative and regulatory issues that they face. He holds a bachelor of international business and a master of arts in international affairs from Carleton University.

**Vivien Wharton-Szatan** has been program manager of the Ministry of Labour's Industrial Health and Safety Program in the Mississauga office since April 2008. She is responsible for a team of inspectors who enforce the *Occupational Health and Safety Act* and applicable regulations as they apply to industrial workplaces that are regulated by the program. She has held a variety of positions with the Ministry of Labour and, between 1991 and 2005, was an occupational health and safety officer in Toronto, responsible for enforcing the *Occupational Health and Safety Act* and its regulations by conducting proactive inspections; investigating complaints, critical injuries, and fatalities; and prosecuting employers when appropriate. She has a certificate in occupational health and safety from Ryerson Polytechnical Institute (1987) and an honours bachelor of science from the University of Toronto, with a double specialization in chemistry and biochemistry.



## Appendix H – Schedule of witnesses – Part One

<b>Dale Craig</b> , expert, engineer, J.L. Richards; Overview of the construction of a building and state of the art in roofing at time of construction	March 5, 2013
<b>John Kadlec</b> , partner at Beta Engineering, structural engineer during construction of Algo Centre Mall	March 6, 2013
<b>Dave Monroe</b> , former vice-president, Harry S. Peterson, Algo Centre Mall roofing system	March 7, 2013
<b>Doug Harman</b> , vice-president and general manager, Coreslab, supplied concrete slab	March 7, 2013
<b>Henry Jasskelainen</b> , former supervisor, Harry S. Peterson, installed roofing system and conducted repairs	March 8, 2013
<b>James Keywan</b> , architect, retained by Algoma Central Properties for the design of the Algo Centre Mall	March 11, 2013
<b>Barbara Fazekas</b> , former chief librarian, Elliot Lake Public Library, tenant of Mall	March 11&12, 2013
<b>Rod Caughill</b> , former development supervisor, Algoma Central Properties	March 12, 13, 14, 19, & 20, 2013
<b>Domenic Dell'Aquila</b> , certified engineering technologist (CET), Trow, hired by Algoma Central Properties	March 20 & 21, 2013
<b>Remy Iamónico</b> , engineer, Trow, hired by Algoma Central Properties	March 21, 2013
<b>Roger Pigeau</b> , former chief building official, City of Elliot Lake	March 22 & 25, 2013
<b>Fred Bauthus</b> , former chief administrative officer, City of Elliot Lake	March 25 & 26, 2013 May 16, 21 & 22, 2013
<b>Barbara Cloughley</b> , former personnel manager, Woolco, former tenant of Mall	March 26, 2013
<b>Robert Leistner</b> , former general manager and vice-president, Algoma Central Properties	March 27 & 28, 2013
<b>Warwick Perrin</b> , president, Ontario Association of Property Standards Officer Inc.	April 2, 2013
<b>Larry Burling</b> , former clerk, City of Elliot Lake	April 2 & 3, 2013
<b>Ken Snow</b> , former maintenance foreman, Algoma Central Properties and Retirement Living	April 3, 2013
<b>Paul Meyer</b> , structural engineer, P. Meyer Engineering, hired by Algoma Central Properties	April 4, 2013
<b>Albert Celli</b> , engineer, Halsall	April 5, 2013
<b>Michael Buckley</b> , engineer, Halsall	April 8, 2013
<b>Jeff Truman</b> , engineer, Halsall	April 9, 2013
<b>Michael A. Luciw</b> , architect, Yallowega Bélanger	April 10, 2013

<b>Richard Quinn</b> , former property manager, Retirement Living	April 11 & 16, 2013
<b>Richard Kennealy</b> , general manager, Retirement Living	April 16, 17 & 18, 2013
<b>Rhona Guertin</b> , comptroller, Retirement Living	April 19, 2013
<b>Paul Officer</b> , fire chief, former building inspector and chief building official, City of Elliot Lake	April 22 & 23, 2013
<b>Chris Clouthier</b> , building inspector, City of Elliot Lake	April 23, 2013
<b>Brian McDonald</b> , project manager, Construction Control	April 24, 2013
<b>Troy Speck</b> , former chief administrative officer and councillor, City of Elliot Lake	April 24 & 25, 2013
<b>Syl Allard</b> , former chief building official, City of Elliot Lake	April 29, 2013
<b>Blaine Nicholls</b> , architect, formerly with Nicholls Yallowega Bélanger	April 30, 2013
<b>Sophie Dennis</b> , assistant deputy minister, Operations Division, Ministry of Labour	April 30 & May 1, 2013
<b>Brian Cuthbertson</b> , former manager, Zellers	May 1, 2013
<b>George Farkouh</b> , former mayor, City of Elliot Lake	May 2, 7 & 15, 2013
<b>Brian England</b> , former Mall manager, Eastwood Mall	May 8, 2013
<b>Glen Day</b> , contractor, Peak Restoration, retained by Eastwood Mall	May 9, 2013
<b>Andrew Holford</b> , engineer, Kleinfeldt Consultants	May 9 & 10, 2013
<b>Bruce Caughill</b> , architect/engineer, Caughill Consulting, retained by owners of Mall	May 10, 2013
<b>Tom Derreck</b> , former chief administrative officer, City of Elliot Lake	May 13, 2013
<b>John Clinckett</b> , architect, retained by Eastwood Mall	May 14, 2013
<b>Alexander Sennett</b> , Eastwood Mall	May 14, 2013
<b>Dimitri Yakimov</b> , former employee, Eastwood Mall	May 15, 2013
<b>George Farkouh</b> (continued), former mayor, City of Elliot Lake	May 15, 2013
<b>Fred Bauthus</b> (second period), former chief administrative officer, City of Elliot Lake	May 16, 21 & 22, 2013
<b>Henrieth Laroue (McCleery)</b> , former Mall manager, Eastwood Mall	May 22 & 23, 2013
<b>Al Collett</b> , councillor, City of Elliot Lake	May 23 & 24, 2013
<b>Bruce Ewald</b> , chief building official, City of Elliot Lake	May 24, 27 & 28, 2013
<b>Sonia Saari</b> , structural engineer, Corselab	May 28, 2013
<b>Panel:</b>	May 29 & 30, 2013
<b>Hassan Saffarini</b> , P Eng - NORR	
<b>Chris Hughes</b> , architect - NORR	
<b>Pouria Ghods</b> , P Eng - Giatec Scientific	
<b>Aaron Dinovitzer</b> , P Eng - BMT Fleet Technology	

<b>Don Denley</b> , former councillor, City of Elliot Lake	June 4, 2013
<b>Tom Turner</b> , former Mall manager, Eastwood Mall Inc.	June 4, 2013
<b>Philip Sarvinis</b> , engineer, Read Jones Christofferson, retained by Eastwood Mall	June 5, 2013
<b>Ralph Regan</b> , former inspector, Ministry of Labour	June 5, 2013
<b>Gregory Saunders</b> , engineer, M.R. Wright	June 6, 2013
<b>Robert Wood</b> , M.R. Wright	June 6 & 7, 2013
<b>Ron McCowan</b> , McCowan and Associates, considered purchase of Mall	June 10, 2013
<b>Rhonda Lendt (Bear)</b> , former Mall manager, Eastwood Mall	June 11 & 12, 2013 August 6, 2013
<b>Rob deBortoli</b> , chief administrative officer, City of Elliot Lake	June 12, 2013
<b>Judy McCulloch</b> , manager of customer service, Scotiabank	June 13, 2013
<b>Jaime Hass</b> , certified engineering technologist (CET), Pinchin	June 14, 2013
<b>Ed Hudson</b> , former Inspector, Ministry of Labour	July 8, 2013
<b>Rick Hamilton</b> , mayor, City of Elliot Lake	July 8, 9 & 10, 2013
<b>Antoine-René Fabris</b> , lawyer, retained by Eastwood Mall Inc.	July 10, 11 & 12, 2013
<b>Lesley Sprague</b> , clerk, City of Elliot Lake	July 12, 2013
<b>Levon Nazarian</b> , leasing manager and real estate advisor, Eastwood Mall	July 15, 16, 17 & 18, 2013
<b>Bob Nazarian</b> , owner, Eastwood Mall	July 23, 24, 25, 26, 20, 30, 31, 2013
<b>Allan Larden</b> , architect	July 30, 2013
<b>Roger Jeffreys</b> , engineer, Ministry of Labour	July 31, 2013
<b>Dale Craig</b> , expert, engineer, J.L. Richards	July 31, 2013
<b>Elaine Quinte</b> , owner, Hungry Jack's, tenant in Mall	July 31, 2013 August 1, 2013
<b>William Elliott</b> , ELNOS	August 1, 2013
<b>Rhonda Lendt (Bear)</b> , former Mall manager, Eastwood Mall	August 6, 2013
<b>Ashley Sherrard</b> , broker, EIR Investments Inc. Brokerage	August 6, 2013



## Appendix I – List of appearances for Participants with standing and witnesses – Part One

Participant	Counsel / Representative
Government of Ontario	Darrell Kloeze Heather Mackay Kristin Smith Judith Parker <b>Ministry of Attorney General</b>
Ontario Building Officials Association	Leo F. Longo <b>Aird &amp; Berlis LLP</b>
City of Elliot Lake	J. Paul R. Cassan Alexandria Little Steven Shoemaker Matthew Shoemaker <b>Wishart Law Firm LLP</b>
Nicholls Yallowega Bélanger Architecture and Blaine Nicholls	Charles Simco <b>Shibley Righton LLP</b>
Algoma Central Properties	Robert J. Richler Robert (Bob) J. Howe <b>Davies Howe Partners LLP</b>
Alexandre Sennett	Jonathan Shime Megan Schwartzentruber <b>Cooper, Sandler, Shine and Bergman LLP</b>
Non-Profit Retirement Residences of Elliot Lake Inc. and NorDev 1425164 Ontario Ltd.	Douglas Kearns <b>Kearns Law Office</b>
Halsall Associates	James A. Hodgson John M. Picone <b>Norton Rose Fulbright Canada LLP</b>
Greg Saunders	Joseph A. Bisceglia Rosario Romano Paul A. Johnson <b>Bisceglia Dumanski Romano &amp; Johnson LLP</b>
Elliot Lake Mall Action Committee (ELMAC)	Peter L. Roy Alexandra Carr Carolyn Filgiano <b>Roy O'Connor LLP</b> Roland Aubé <b>Aube Law Office</b> Jeffrey Broadbent <b>Feifel Broadbent Gualazzi Personal Injury Law Firm</b> R. Douglas Elliott <b>Douglas Elliott PC</b> Shawn Richard

Participant	Counsel / Representative
Brian MacDonald	Scott G. Thompson <b>Hicks Morley Hamilton Stewart Storie LLP</b>
exp Global Inc.	David Outerbridge Myriam Seers <b>Torys LLP</b>
John Clinckett	John A. Little Patricia Harper <b>Keel Cottrelle LLP</b>
Seniors' Action Group of Elliot Lake (SAGE)	Keith Moyer Chuck Myles
James Keywan, Bruce Caughill and Allan Larden	P. John Brunner Mario Delgado <b>Brunner and Lundy Barristers and Solicitors</b>
Association of Professional Engineers of Ontario	Leah Price <b>Association of Professional Engineers of Ontario</b> Philip Tunley Luisa Ritacca <b>Stockwoods Barristers</b>
Coreslab Structures (Ont) Inc.	Charles P. Criminisi Devon M. Ryerse <b>Agro Zaffiro LLP</b>
Bob Nazarian, Levon Nazarian, Eastwood Mall Inc. and Yorkdale Group	Michael Title Derrick Fulton <b>Steinberg Morton Hope &amp; Israel LLP</b>
Thomas Derreck	John Curtis John Curtis Legal Services
Rod Caughill and Robert Leistner	James Maloney <b>Hughes Amy LLP</b>
Réjean Aylwin, Rachelle Aylwin, Stéphane Aylwin, Teresa Perizzolo and Cindy Lee Allan	Roger G. Oatley Shenthuran Subramaniam <b>Oatley, Vigmond LLP</b>
Robert Wood	Robert MacRae Michael O'Neill <b>O'Neil De Lorenzi and Mendes</b>
Barbara Fazekas	James Hunt
Jeff Truman	Neil Perrier <b>Perrier Law</b>
Pinchin Environmental Ltd.	John Russo <b>Pallet Valo LLP</b>





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## Glossary, Abbreviations and Acronyms



## Glossary, Abbreviations and Acronyms

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## Glossary

<b>abrade</b>	to scrape or wear away a surface by friction or striking.
<b>abut</b>	to touch along an edge.
<b>anchor bar</b>	a V-shaped anchoring device usually fabricated from ½-inch round bar and used in steel work to secure a beam to masonry.
<b>angle (steel)</b>	an L-shaped steel section most commonly used in tension bracing to resist lateral forces on a structure.
<b>architect</b>	a licensed design professional, responsible for the aesthetics, appearance, and functionality of built objects in both public and private settings. The architect is responsible for the creation of construction drawings and specification documents that translate the vision and aesthetics into a buildable project.
<b>as-built drawings (as constructed drawings)</b>	revised set of drawings submitted by a contractor when a project is completed. The drawings are meant to reflect all changes made in the specifications and working drawings during the construction process, and show the exact dimensions, geometry, and location of all elements of the work completed under the contract.
<b>assembly occupancy</b>	the use of a building, or part of it, by a gathering of persons for civic, political, travel, religious, social, educational, or similar purposes, or the serving of food or drink. The term may include, among others, assembly halls, passenger or bus depots, churches, restaurants, dance schools, day care centres, and schools. Permits and other laws and regulations governing assembly occupancies vary by area.
<b>backer rod</b>	a round foam rod used to fill joints between building materials. It is used to fill most of the void in a joint so caulking can be applied to finish filling the void and create an airtight and watertight seal.
<b>backfill</b>	the replacement of excavated earth into a trench around or against a foundation wall or over buried infrastructure.
<b>batching</b>	the mixing of materials which together make up the concrete.
<b>beam</b>	a structural member transversely supporting a load through its capability to resist bending; a structural member carrying building loads (weight) from one support to another; sometimes called a "girder."
<b>bearing</b>	the section of a structural member, such as a column, beam, or truss, that rests on the supports.
<b>bearing point</b>	a point where a bearing or structural weight is concentrated and transferred to another point (i.e., the foundation).
<b>bonded topping</b>	a poured concrete slab reinforced with wire mesh and chemically bonded / adhered to the top of the hollow core slab to provide increased load capacity.
<b>bonding agent</b>	a substance (adhesive) applied to material to create a bond between it and a succeeding layer, such as between a concrete topping and hollow core slabs.
<b>bracing</b>	a structural member used to stiffen or support framing members.



<b>building envelope</b>	the walls and roof of a building which separate the interior from the exterior – the envelope which encloses the building.
<b>butt joint</b>	the space left at the ends of hollow core slabs to allow for expansion, contraction, and cambering of the slabs.
<b>camber</b>	a slightly convex curvature built into a beam or trusts to compensate for deflection under load. Camber is also built into structural components, roadways, or bridges to facilitate water runoff.
<b>cantilever</b>	a beam anchored at only one end. The free, unsupported end is capable of supporting a weight. Any beam built into a wall or attached to a column with a projecting free end forms a cantilever, which may carry a balcony, a canopy or a roof.
<b>capacity</b>	the amount of weight an item is capable of carrying or supporting.
<b>carbonation</b>	a chemical reaction caused by carbon monoxide in the air penetrating the concrete and reacting with the components of the concrete, causing a reduction in its alkalinity and, like chlorides, acts to break down the protection against corrosion that concrete normally provides for steel.
<b>caulking</b>	a flexible material used to seal a gap between two surfaces.
<b>catch basin</b>	a receptacle or reservoir that receives surface water runoff or drainage.
<b>certificate of substantial performance</b>	the substantial performance of a contract is determined in accordance with the provisions of the Ontario <i>Construction Lien Act</i> . The building is inspected to identify deficiencies or the quantity of work left to be completed. Based on the formula set out in section 2 of the <i>Construction Lien Act</i> , a determination is made as to whether the construction is ready to be accepted as substantially performed. Once a building has been certified as substantially performed, the <i>Construction Lien Act</i> requires that the Certificate of Substantial Performance be published in the Daily Commercial News. The publication of the certificate serves as notice to suppliers and subcontractors of when any lien rights will expire.
<b>change directive</b>	written instruction prepared by the consultant and signed by the owner, directing the contractor to proceed with a change in the work within the general scope of the contract documents. Change directives are issued before the owner and the contractor agree on adjustments in the contract price and time.
<b>change order</b>	written amendment to the contract prepared by the consultant and signed by the owner and the contractor stating their agreement on: a change in the work; the method of adjustment or the amount of the adjustment in the contract price, if any; and the extent of the adjustment in the contract time, if any.
<b>chord</b>	the top and bottom part of a truss, usually horizontal, resisting compression or tension.
<b>civil engineering</b>	a professional engineering discipline, which deals with the design, construction, and maintenance of the physical and naturally built environment, including works like roads, bridges, canals, dams, and buildings.
<b>cladding</b>	a protective covering installed on or fastened to the outside of a building (i.e., vinyl siding).
<b>column</b>	a vertical structural member carrying a compressive load. Loads are transferred to columns through beams.

<b>composite action</b>	when a bonded concrete topping works in conjunction with the hollow core slabs to increase the load capacity of the slabs.
<b>compression force or load</b>	an external force which tends to push parts of a body together.
<b>compressive stress</b>	the resistance of a material to an external pushing or shortening force.
<b>concrete topping</b>	a structural cast-in-place surface for precast floor or roof systems; <i>see also</i> bonded topping.
<b>conduit</b>	a protective sleeve or pipe typically used for installing electrical wiring.
<b>consultant</b>	the person or entity hired by the owner and identified as such in the contract documents; the architect, engineer, or entity licensed to practise in the province or territory of the place of the work.
<b>contemplated change notice</b>	written documentation prepared by the consultant proposing a change to the contract for which the contractor is requested to submit a quotation for any changes in cost or schedule.
<b>contract document</b>	any document that sets out the terms and conditions of the agreement between the parties to the contract; in the context of a construction project, also includes the plans and specifications.
<b>control joint (crack control joint)</b>	tooled, straight grooves made on concrete surfaces (floors, decks) to "control" where the concrete should crack.
<b>corrosion</b>	the deterioration of metal or concrete by chemical action, also known as rust.
<b>creep</b>	the slow but continual permanent deformation of a material under sustained stress.
<b>crickets</b>	a localized rise in the roof to create a slope for shedding water by pushing it from high points to low points and drains.
<b>dead load</b>	the weight of all permanent structural and other building components carried by a structural element, including its own weight, partitions, and permanent equipment.
<b>deflection</b>	the flexural (bending) displacement of a structural member under load, particularly the vertical displacement of a horizontal beam.
<b>deformation</b>	a change in the shape or form of a structural member that does not cause its failure or rupture.
<b>design-bid-build</b>	traditional method of project delivery in which the owner contracts with separate entities for each of the design and construction of a project.
<b>destructive testing</b>	testing which destroys or partially destroys or causes damage to the materials being tested.
<b>detail drawings</b>	large-scale drawings of a small part of the construction, showing how the component parts fit together; also used for small surface details, such as decorative elements.
<b>double-tee</b>	a precast concrete member composed of two concrete beams with a flat slab cast across and projecting beyond the beams.

<b>drawings</b>	the graphic and pictorial portions of the contract documents, showing the design, location, and dimensions of the work, generally including plans, elevations, sections, details, and diagrams.
<b>easement</b>	a formal contract which allows a party to use another party's property for a specific purpose; for example, a hydro easement allows the hydro company to run power lines under a residential property.
<b>electrical runway</b>	an enclosed metal or concrete runway for electrical cables to be passed through. On construction projects using hollow core precast slabs, the hollow cores are sometimes used as electrical runways.
<b>elevation view</b>	drawing of a structure with the view seen from one side, a flat representation showing all the parts of the building which are seen from a particular direction (i.e., north elevation).
<b>encumbrance</b>	any right or interest that exists in someone other than the owner of the property and that restricts or impairs the transfer of the property or lowers its value; includes an easement, a lien, a mortgage, or accrued and unpaid taxes.
<b>expansion joint</b>	an assembly designed to safely absorb the temperature-induced expansion and contraction of various construction materials (including concrete) to absorb vibration, or to allow movement caused by warming and cooling.
<b>factor of safety</b>	factor used in design to provide a margin of safety against failure of a design element. In steel structures, this may be with respect to the yield strength or the ultimate strength of the structure.
<b>flanges</b>	in a beam, the thin horizontal plate elements on the top and bottom of the element that resist bending by carrying compression and tension stresses.
<b>flashing</b>	a thin continuous piece of sheet metal or other impervious material installed to prevent the passage of water into a structure from an angle or joint.
<b>footings</b>	concrete pads designed to transfer the structural loads from the building (snow load, live load, dead load, wind load, earthquake load, etc.) to the soil or rock beneath the building.
<b>functionality of a building</b>	includes such things as occupant comfort, health and safety, building envelope, accessibility and general <i>Building Code</i> compliance.
<b>general review</b>	review required by section 1.2.2.1 of the Ontario <i>Building Code</i> ; an inspection that must be performed by an architect or engineer during the construction of a building to confirm that the building has been constructed in general conformity with the plans, sketches, drawings, specifications, and requirements of the Ontario <i>Building Code</i> .
<b>geotechnical engineer</b>	an engineer who specializes in rock and soil mechanics, groundwater, and foundations; generally responsible for determining the amount of load that the existing ground can safely withstand from a proposed structure, and for making backfill and foundation recommendations.
<b>geotechnical investigation (or survey)</b>	the evaluation of the earth under the project site, which is done to determine the stability of the site and what, if anything, needs to be done to prepare the site for construction.



<b>gridlines</b>	buildings with columns of reinforced concrete or structural steel as a main element of the frame are laid out on a structural grid. The plans are drawn with a system of horizontal and vertical reference lines, so that all the columns and details can be referred to. The vertical gridlines are numbered, and the horizontal are lettered.
<b>grout</b>	a wet mixture of cement, sand, and water that flows into masonry or ceramic crevices to seal the cracks between different pieces; mortar made of such consistency (by adding water) that it will flow into the joints and cavities of the masonry work and fill them solid.
<b>grout key</b>	formed when two core slabs are placed side by side, so that the bottom parts of the slabs abut but the top side opens up like a V. This key is then grouted.
<b>hollow core slab</b>	a precast concrete slab containing pre-stressed cables, typically used in the construction of floors in multi-story buildings. The precast concrete slab has tubular voids extending the full length of the slab, usually with a diameter equal to 2/3 to 3/4 of the slab thickness, thus making the slab much lighter than a solid floor slab of equal thickness or strength.
<b>hydrostatic pressure</b>	pressure exerted by water.
<b>infrastructure</b>	the basic structure or features of a system or organization.
<b>interference drawings</b>	a set of drawings that highlight where any problems may arise during the installation of the various building systems (i.e., where one system may potentially interfere or intersect with the installation of another building system or installation).
<b>Iso-Flex</b>	a urethane sealant used to seal, protect, and reduce corrosion in concrete and masonry from damage caused by water, chloride-ion, acids, and freeze-thaw cycles.
<b>joint</b>	in a building structure or concrete work, a joint or gap between adjacent parts.
<b>key</b>	refers to the grout key, or alternatively the gap (space) at the end of the slabs – also referred to as the butt joint.
<b>kip</b>	1,000 pounds (kilopound)
<b>leasehold improvement</b>	alterations made to rental premises to customize the space for the specific needs of a tenant.
<b>lateral loads</b>	live loads, the main component of which is a horizontal force acting on the structure. Typical lateral loads would be a wind load against a facade, an earthquake, or the earth pressure against a wall (such as a foundation wall).
<b>levelling plate</b>	a steel plate set to an elevation (height) used for placing/erecting structural steel.
<b>live load</b>	loads other than dead load, including occupancy, snow, rain, ice, etc.
<b>load capacity</b>	the weight that can be carried by a structural member.
<b>load transfer</b>	the transfer of weight from one structural component to another to help distribute the load.
<b>maximum permissible stress (allowable stress)</b>	the maximum stress allowed by the Ontario <i>Building Code</i> for structural members. The maximum stress will depend on the materials used and the anticipated use of the structure.

<b>member</b>	an individual element of a structure, such as a beam, column, or brace.
<b>neoprene</b>	a synthetic rubber which is stable and maintains flexibility over a wide temperature range.
<b>open web steel joist (OWSJ)</b>	a lightweight steel truss consisting of parallel top and bottom chords with support members placed in a zigzag or crisscross pattern to connect the top and bottom chords.
<b>pad footing</b>	a thick slab-type foundation used to support a structure or a piece of equipment.
<b>parapet</b>	a low, protective wall-like barrier along the edge of a roof.
<b>penetrating sealer system</b>	sealers, such as silanes, siloxanes, and silicates, that penetrate the concrete to form a chemical barrier shielding against moisture penetration and de-icing chemicals. Usually they provide invisible protection without changing the surface appearance, and most products are breathable, allowing moisture vapor to escape. They are most commonly used outdoors, since they provide excellent protection against harsh exposure conditions.
<b>plan view</b>	drawing of a structure with the view from overhead, looking down.
<b>plumb</b>	exactly vertical
<b>ponding</b>	the accumulation of water at low points in a roof.
<b>poured-in-place concrete (cast-in-place concrete)</b>	concrete poured into site-specific forms and cured on site.
<b>precast concrete</b>	concrete produced by pushing it onto a metal bed or “form,” which is then cured in a controlled environment, transported to the construction site, and lifted into place.
<b>pre-stressed cables</b>	high tensile steel cables that are put under tension before being cast in concrete.
<b>protection board</b>	asphalt-impregnated boards used in roofing installation to protect waterproof membranes from damage.
<b>raking</b>	the act of using a rake to score the top of a hollow core precast concrete slab to prepare it to receive a bonded topping.
<b>rebar (reinforcing bar)</b>	a steel rod with ridges for use in reinforced concrete.
<b>redundancy</b>	the duplication of critical components or functions of a system to increase the reliability of the system, such as providing extra strength or added safety.
<b>roof drain</b>	a drain designed to accept rainwater on a roof and discharge it into a downspout.
<b>seal (stamp)</b>	the mark made on a construction drawing by a rubber stamp, such as those issued by the Professional Engineers of Ontario or the Ontario Architects Association.
<b>section loss</b>	what occurs when corrosion reduces the original steel material which in turn leads to a decrease in the thickness of the material itself (be it the web, flange, bolt, weld, connection angle, etc.).
<b>section drawings</b>	large-scale drawings which are a standard way of showing building construction details, typically showing complex junctions (such as floor to wall junction, window openings, eaves, and roof top).

<b>seismic</b>	relating to earthquakes; seismic loads are horizontal and are resisted by the lateral force resisting system in a building.
<b>service load</b>	the actual dead and live loads that the structure is designed to carry; synonymous with working load.
<b>setbacks</b>	the minimum distance a structure must be from the relevant lot line.
<b>shear</b>	in a beam, the tendency, at any section or cut along its length, for the left portion to move vertically relative to the right portion.
<b>shop drawings</b>	drawings, diagrams, illustrations, schedules, performance charts, brochures, product data, and other data which the contractor provides to illustrate details of portions of the work. These drawings are created by the manufacturer or supplier of the products.
<b>shoring</b>	the process of supporting a structure in order to prevent collapse so that construction can proceed. It can also be used as a noun to refer to the materials used in the process. Shoring is generally temporary in nature and is removed as the building construction achieves certain conditions or strength.
<b>site instructions</b>	any instruction given by the authorized person or entity to the contractor, in relation to the site/works.
<b>spalling</b>	the cracking and flaking of metal particles from a surface.
<b>specifications</b>	the contract documents detailing the written requirements and standards for products, systems, workmanship, quality, and the services necessary for the performance of the work.
<b>splice</b>	connection of two similar materials by lapping, welding, gluing, mechanical couplers, or other means.
<b>strength</b>	the load-bearing capacity of a structural member, determined by the allowable stresses (dead and live loads) assumed in the design.
<b>strip footing</b>	a continuous strip of concrete that serves to spread the weight of a load-bearing wall across an area of soil.
<b>strip membrane</b>	waterproofing membrane material cut into strips, as opposed to one continuous piece.
<b>structural drawing</b>	graphic representations of the members, assemblies, and systems that will transmit live and dead loads of the structure to the ground beneath the building.
<b>structural engineer</b>	a specialty discipline within civil engineering. Structural engineers analyze, design, plan, and research structural components and structural systems to achieve design goals and ensure the safety and comfort of users or occupants.
<b>stub column</b>	a column which does not have footing and rises from beams or slabs for upper levels.
<b>superimposed load</b>	the total maximum load which a floor or roof is capable of sustaining, including the live and dead loads.
<b>swale</b>	a shallow depression, in a flat area, that is used in a stormwater drainage system.
<b>tensile strength</b>	the maximum stress that a material can withstand while being stretched or pulled before necking (when the material starts to significantly stretch and reduce in cross-section) Tensile strength is the opposite of compressive strength.



<b>tension</b>	the state or condition imposed on a material or structural member by pulling or stretching.
<b>thermal movement</b>	changes in dimension of masonry or concrete resulting from fluctuations of temperature over time.
<b>torque</b>	a force that produces or tends to produce rotation or torsion.
<b>traffic plate</b>	a piece of material used to protect a surface from wear and tear caused by vehicular traffic.
<b>truss</b>	a structural component composed of a combination of members, usually in a triangular arrangement, to form a rigid framework; often used to support a roof.
<b>urethane</b>	a water-soluble polymer used for a wide variety of applications, such as foam insulation, coatings, and adhesives.
<b>vapour barrier</b>	material used to prevent vapour or moisture penetrating a structure or another material, thus preventing condensation.
<b>vapour migration</b>	penetration of vapour through walls or roofs, caused by the vapour pressure differential between the inside and the outside of a structure. (Vapour pressure is the component of atmospheric pressure caused by the presence of vapour and is expressed in inches, centimeters, or millimeters of height of a column of mercury or water.)
<b>volume change</b>	an increase or decrease in volume. <i>See also</i> deformation.
<b>Wearing slab / wearing course</b>	a topping or surface treatment to increase the resistance of a concrete pavement or slab to abrasion.
<b>web</b>	component of a beam defined as the thin central vertical plate element connecting the upper and lower horizontal elements called flanges. In a beam, the web resists shear forces caused by vertical loads.
<b>web joist</b>	the members which are arranged in a zigzag or crisscross patterns and are used in place of solid plate to connect the chords or flanges to create the truss or girder.
<b>wood key</b>	a wedge of wood inserted in a joint to limit movement.
<b>working load</b>	service load
<b>yield strength</b>	the stress at which a material begins to deform plastically (deformation that does not disappear when the force causing the deformation is removed). Before the yield point, the material will deform elastically and will return to its original shape when the applied stress is removed. Once the yield point is passed, some fraction of the deformation will be permanent and non-reversible.
<b>zero slump concrete</b>	concrete of stiff or extremely dry consistency which holds its form once produced and shows no measurable slump.

## Abbreviations and Acronyms

ACP	Algoma Central Properties
APEGBC	Association of Professional Engineers and Geoscientists of British Columbia
ATA	Alex Tobias Associates
BCBC	British Columbia Building Code
BOMA	Building Owners and Managers Association
CANDU	Canada Deuterium Uranium
CAO	chief administrative officer
CBO	chief building official
CET	certified engineering technologist
CEO	chief executive officer
CIPREC	Canadian Institute of Public Real Estate Companies
CPD	continuing professional development
CSA	Canadian Standards Association
DSE	designated structural engineer
ELNOS	Elliot Lake and North Shore Corporation for Business Development
FTA	Franklin Trow Associates Ltd.
HSP	Harry S. Peterson Company
LoA	Letters of Assurance
MFIPPA	<i>Municipal Freedom of Information and Protection of Privacy Act</i>
MOH	Ministry of Housing
MOL	Ministry of Labour
OAA	Ontario Association of Architects
OBC	Ontario <i>Building Code</i>
OC	order in council
OSIM	Ontario Structure Inspection Manual
OSPE	Ontario Society of Professional Engineers
PEA	<i>Professional Engineers Act</i>

<b>P. Eng.</b>	professional engineer
<b>PEO</b>	Professional Engineers of Ontario; Association of Professional Engineers of Ontario
<b>psf</b>	pounds per square foot
<b>RJC</b>	Read Jones Christoffersen
<b>RRO</b>	Revised Regulations of Ontario
<b>RRQ</b>	Revised Regulations of Quebec
<b>RSA</b>	Revised Statutes of Alberta
<b>RSO</b>	Revised Statutes of Ontario
<b>SAR</b>	Structural Adequacy Report
<b>SO</b>	Statutes of Ontario









PHOTO: Peter Rehak





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The Elliot Lake Commission of Inquiry

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